

THE
FRAMEWORK OF UNION.

Closer Union Society.



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“The Government of South Africa.”

We beg to inform our readers that every effort is being made to issue the complete and corrected edition of *The Government of South Africa* before the meeting of the National Convention. The book will be bound and issued in two volumes, the first containing the text and the second the tabular statements, diagrams and maps. The price has been fixed at 10s., in order to bring the book within the reach of everyone at a time when the future constitution of South Africa is under consideration. This price will scarcely cover the cost of printing and binding, and the authors cannot engage to produce a further reprint.

To prevent disappointment, therefore, we should be glad if those who wish to possess copies will order them beforehand, so that a fairly accurate statement may be formed of the number to be issued. Orders may be booked through any of the local depots of the Central News Agency, Limited, or may be sent direct to the office of the Central News Agency, Limited, at Johannesburg or Cape Town. The copies will be supplied as fast as they come from the press to subscribers according to the priority of the date of their orders. Those who wish to receive early copies are therefore requested to book their orders as soon as possible. The book can be delivered through any of the local depots of the Central News Agency, Limited, or may be ordered through booksellers, who will be supplied on the usual terms. If, however, it is desired that the two volumes (which are necessarily large) should be sent by post, an additional 2s. should be sent for postage.

The Framework of Union.

A COMPARISON OF SOME UNION
CONSTITUTIONS.

With a sketch of the Development
of Union in Canada, Australia and
Germany ; and the text of the Consti-
tutions of the United States, Canada,
Germany, Switzerland and Australia.

Prepared for and issued by the Closer Union Society.

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1908.



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PREFACE.

As this work has been prepared for, and is published by the Closer Union Society, the author feels that it is necessary to explain that the aim which underlies it is to provide a manual of reference to the Constitutions of other countries which have achieved Closer Union. At first it was intended merely to bring up-to-date a manual prepared for the Convention of 1891 in Australia by Mr. R. C. Baker (now the Hon. Sir R. C. Baker, K.C.M.G.), who very kindly gave permission for this to be done. But it was found that conditions had altered so greatly since 1891 that a mere bringing up-to-date of Sir R. C. Baker's manual would scarcely serve the purpose required; and the author therefore decided to incorporate only those parts of Sir R. C. Baker's work which will be found in Chapters II., III. and IV. of Part II. of this book.

As the book appears, it has been composed with the sole idea of supplying at once some elementary knowledge, and the necessary references for a far more complete knowledge, of such parts of the achievements of other countries in the matter of Closer Union as appeared to be of practical use to South Africa. The test of utility will explain some otherwise inexplicable omissions. Thus nothing has been said of the American Executive, and the Executive Department of Government generally, receives far less attention than the other two great Departments. Similarly, the organization of the separate States is dealt with only in one confessedly inadequate chapter; and the Constitution of Germany is hardly ever referred to. These and other omissions are all due to the fact that the author has tried always to keep before him the single aim of utility for those who are studying the problem of Closer Union in South Africa.

To say that is to touch on another difficulty with which the author has continually found himself confronted—that of deciding how deeply he should go into those many intricate questions of legal interpretation which appear to be the inevitable consequence of the adoption of a written Union Constitution in any country, and here the author can only say that he has tried in every case to avoid unnecessary technicality without descending to a treatment of his subject which would be merely popular and superficial, and

worthless to the serious student. At the same time he does not pretend to have done more than scratch the surface of many a vital problem. Each of the separate subjects, for instance, enumerated in the chapter on the Distribution of Legislative Power opens a long vista of legal decisions: these the author has been compelled to avoid.

As for the historical chapters in Part I., the author believes that a study of the development of Union in Canada and Australia is particularly necessary in South Africa at this moment, and he knows by experience how difficult it is to obtain a clear account of that development. In the case of the United States there is no such difficulty. In this connection the author wishes to acknowledge his debt to Messrs. Quick and Garrañ. Chapter II. of Part I. is based almost entirely upon their historical introduction to the Annotated Constitution of the Australian Commonwealth. That invaluable work has been throughout of the greatest assistance to the author, who would like to pay a sincere tribute of admiration to the ability and research of its joint authors.

No attempt has been made to discuss or illustrate the working of the Australian Constitution: the material for such an attempt has not yet been published in a collected form, and lack of time has made it impossible for the author to undertake the necessary research.

Finally, the author may perhaps be allowed to say that he has scrupulously tried to avoid any expression of personal opinion while deliberately preferring to rely in almost every case on quotation; and to plead in extenuation of both obvious defects and latent errors that it has been necessary to bring out this book in a very short time and under the stress of a great pressure of other work.

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THE FRAME-WORK OF UNION

PART I.

UNION IN CANADA, AUSTRALIA AND GERMANY.

CHAPTER I.

THE CREATION OF THE DOMINION OF CANADA.

The year 1763 saw in the Peace of Paris the treaty which confirmed the victory of Great Britain over France in North America. On the 10th October, 1864—just over a century later—there met at Quebec that convention of delegates from Upper and Lower Canada, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, whose work was the creation of the Dominion of Canada. Successful as was the work of that Convention—rapid as was the accomplishment of the task of creating the Dominion—that success and that rapidity can be accounted for only by some description of the development of the States of Canada during the preceding century. The Dominion Constitution is not the mushroom growth of a night : its roots go deep into the history of the land : it is in every way a native, long matured and sturdy growth.

“The whole population of Canada when she came under the British Flag ” *Canada in 1863*. —(says Mr. C. G. D. Roberts in his “History of Canada”)—“was about sixty thousand. This hardy handful was gathered chiefly at Quebec, Three Rivers and Montreal. The rest tailed thinly along the shores of the St. Lawrence and the Richelieu. The lands about the Great Lakes, and the western country, were held only by a few scattered forts, buried here and there in the green wilderness. At Detroit had sprung up a scanty settlement of perhaps one thousand souls. . . . Quebec had seven thousand inhabitants. Most of them dwelt between the water’s edge and the foot of the great cliff whose top was crowned by the citadel. Where the shoulder of the promontory swept around towards the St. Charles, the slope became more gentle, and there the houses and streets began to clamber towards the summit. . . . Part of the city was within walls, part without. Most of the houses were low, one-storey buildings, with large expanse of steep roof and high dormer windows. Along the incline leading down to the St. Charles stretched populous suburbs. On the high plateau where now lies the stately New Town, there was then but a bleak pasture land whose grasses waved against the city gates.

"Three Rivers, situated at the mouth of the St. Maurice, 76 miles above Quebec, was a small town dwarfed politically and socially by Quebec on the one side and Montreal on the other. Iron mines in the neighbourhood gave it a measure of importance; and it was the stopping-place for travellers journeying between its bigger rivals. Montreal, after its childhood of awful trial, had greatly prospered. Its population had risen to about nine thousand. The fur trade of the mysterious North-West, developed by a succession of daring and tireless wood-rangers, had poured its wealth into the lap of the city of Maisonneuve. . . . The city was enclosed by a stone wall and a shallow ditch, once useful as a defence against the Indians, but no protection in the face of serious assault. At the lower end of the city, covering the landing-place, rose a high earth-work crowned with cannon. The real defences of Montreal were the citadel of Quebec and the forts on Lake Champ-lain."

The Early Settlers.

The immediate result of the Peace of 1763 was a great influx of English settlers. To them the promise was made that as soon as quiet was secured, representative government on the lines of that given to the English Colonies south of the St. Lawrence would be granted. They received liberal grants of land upon the easy conditions of allegiance to the English Crown and obedience to the laws, and with the contingency of payment of a small "quit-rent" to the Government after a period of ten years. As far as criminal matters and civil contracts went, the law of England was substituted for that of France. Rights of property, however, were still governed by French law, with all its encumbrances of seigniorial rights, secret mortgage and the provision of a "dower" to, and the "partnership" of married women. The executive government was entrusted to a Governor and a Council.

The Quebec Act, 1777.

In 1774—the critical year of the relations between Great Britain and her Colonies in the South—the year, in fact, in which the "Continental Congress" of those Colonies met at Philadelphia and formulated those grievances which led to the outbreak of the American Revolution in 1775—was passed the first great legislative enactment of the history of Canada. The *Quebec Act* extended the limits of the Province of Quebec southward to the Ohio and westward to the Mississippi. In defiance of the promises made to the English settlers, the Parliament of Great Britain refused representative government and confirmed the rule of the Governor and Council. In opposition to what the English settlers regarded as their true interest, the *Quebec Act* also restored French civil law and declared the Roman Catholic religion to be the established religion of the country.

Nova Scotia.

The history of Nova Scotia or, to call it by its French name, *Acadie*, had been widely different from that of the Province of Quebec. First settled by a colony from Scotland in 1614, under a charter granted by James I., it had soon become part of the general field of conflict between the English and French in North America. But as far as Nova Scotia was concerned, that conflict ended in 1748 when, under the Treaty of Aix-la-Chapelle, the whole of *Acadie* was ceded to England. The extent of territory comprised in this cession was almost wholly undefined; but the English took immediate steps to strengthen their hold at least on the part nearest to the sea-board. Thus in 1749 the great fortified place of Halifax was built, and when the French inhabitants—though apparently

passive under the English rule—were found to be conspiring against it, and finally refused to take the oath of allegiance, they were removed in ship-loads. A few found their way back again, but from the date of the expulsion of the Acadians the population of Nova Scotia was distinctly British. Its territory included the whole of what are now New Brunswick and Prince Edward Island. In 1758 it was granted representative government, and its first Parliament, which met in that year, consisted of twenty-two members. As a result, the Colony began to attract immigrants from New England, and the population increased rapidly. Prince Edward Island was separated from Nova Scotia in 1770, and received the grant of representative government in 1773; whilst New Brunswick was declared a separate Colony in 1784 and given a Constitution which entrusted the government to a Governor, a nominated Council of twelve members, and an elective Assembly of twenty-six representatives.

This separation of New Brunswick was directly due to the influx of loyalists driven out of the American States at the end of the War of Independence. From the coming of the loyalists dates the era of prosperity in Canada. Large numbers of these refugees crowded into Upper Canada; others settled in Nova Scotia and New Brunswick. Their immigration had a marked effect in changing the type of the population of the Provinces in which they settled. They represented the progressive spirit of the American, as opposed to the unenterprising contentment of the French, Colonist. Politically, the period immediately succeeding their coming was one of great unrest. In Upper and Lower Canada especially the discontent soon became acute. The *Quebec Act* of 1774, as we have seen, denied the Province representative government. The settlers demanded it as a right, and in this they were supported by the French Canadians, who foresaw that—as far, at least, as the lower part of the Province went—it would give them a monopoly of political power. On the question of Law, the settlers were fiercely opposed to the system established by the *Quebec Act*. The agitation resulted in the second great Constitutional Enactment of Canadian history.

The principle of this enactment was the separation of Upper from Lower Canada and a differentiation in legislation suited to their respective populations. Thus Lower Canada—which had a population of about one hundred and twenty-five thousand, of which the large majority was French—was separated from Upper Canada, whose people numbered less than twenty thousand and were predominantly British. Each of the two new Provinces was given a separate Legislature, and an Executive Council. In each the Legislature consisted of two Houses—a Legislative Council, whose members were appointed by the Crown for life, and a House of Assembly. In Lower Canada there were fifteen members for the Legislative Council and fifty for the House of Assembly. The great majority of the members of the Lower House was French. Similarly, though the English Criminal Law and the Habeas Corpus Act were declared to be in operation in Lower Canada, the whole body

The Loyalists.

The Constitutional Act, 1791.

of the rest of the law of the Province remained French ; whilst the religion and language of the French Canadians remained undisturbed. But in order to safeguard to some extent the rights of the Protestant minority, a large portion of the wild lands was set aside for the support of the Protestant Clergy, and became known as the "Clergy Reserves." On the other hand, Upper Canada was made in all respects a British Province, with British laws and a British system of land tenure. In proportion, also, to the smaller population of the Upper Province, its Legislative Council consisted of only seven, and its Assembly of only sixteen, members.

Political
Disputes.

The five Provinces of Canada were, therefore, in 1792 all under representative government. But in each the principle of representation was applied only to a limited extent. The nominated Upper House ; the restricted control of expenditure placed in the hands of the Lower House—which had no power in any Province over the revenue derived from Crown lands, nor over that derived from the lease of mines, etc., known as "Casual and Territorial Revenue" ; and the complete absence of responsibility on the part of members of the Executive Council, together with the lack of knowledge of Colonial conditions which continually hampered the Governors sent out by the Imperial Government—all these were continual sources of friction between the representatives of the people in the Lower House of each Colony and the nominated officials. It would serve no useful purpose to trace in detail the political strife of this period. It is perhaps sufficient to say that not only in Upper and Lower Canada, but also in New Brunswick and Nova Scotia, the conflict had become acute by the year 1807, when it was stilled by the threat of war between England and the United States ; and that it broke out again as soon as that threat passed away, only to die down once more when, in the year 1812, war actually broke out.

With the war of 1812-1814 we have here nothing to do. But there can be no doubt that the success of the Canadian Provinces in repelling American invasion over the whole length of their borders—a success which was due in no small degree to the victories won by the Canadian Militia—did much to foster that spirit of self-reliance and national pride which is the necessary inspiration of any movement fruitful in union. As a historian of Canada has well said :—*

"Canada gained by this baptism of fire a martial self-reliance, the germs of a new spirit of patriotism. She learned that whether of French or English blood, Scotch, Irish or German, her sons were one in loyal valour when the enemy came against her gates. Her devastated homes, the blood of her sons, these were not too great a price to pay for the bond of brotherhood between the scattered Provinces."

Apart from this growth of a common political sentiment, the immediate result of the war for Canada was a great increase in population. Just as the American Rebellion had driven large numbers of Loyalists to find a home in Canada, so from the year 1816,

* Mr. Roberts : "History of Canada," p. 253.

Great Britain—casting round for some way of disposing of her disbanded soldiers and surplus labouring population at the close of the Napoleonic wars—hit upon the fortunate resource of promoting emigration to Canada. Beginning in 1816, this tide of immigration flowed into Canada in a constantly increasing volume; so that Mr. Roberts says:—*

“It is estimated that in the four years beginning with 1829 the settlers seeking a home within our borders numbered no less than one hundred and sixty thousand. This period of our history is well named the period of the ‘Great Immigration.’”

But side by side with this rapid increase of population went a corresponding aggravation of political feeling. For the half century succeeding the war, political struggles are (to quote Mr. Roberts again)†:—

“almost the whole of Canadian history. The contestants are on the one side the people as represented by the Assembly; on the other side the Executive and Legislative Councils, usually in alliance with the Governor. The strife went on in Upper Canada, Lower Canada, Nova Scotia, New Brunswick, with such variations as chance and local differences might be expected to produce; but, at the same time, with such similarities that we are forced to seek some one general cause as the base of all the quarrels. In one Province religious difficulties may seem, at first glance, to explain the trouble; in another the root of the difficulty may appear to lie in antagonisms of race and language. But these, when looked at fairly, appear to be mere accidents. The struggle is, in fact, a constitutional one. It is for the reality of representative institutions—for what is known as Responsible Government. The Constitutions given to the several Provinces in the latter part of the preceding century had put the government nominally in the hands of the people, but by no means actually so. In fact, its functions were usurped by the Executive Council, whose members, as we have seen, held office for life and were responsible to no one. They represented the views and wishes of a small and exclusive class, and maintained a show of constitutional authority by their connection with the Legislative Council, wherein most of them held seats. They were, in name, the Governor’s advisers; but circumstances and the support of the Legislative Council, and their own importance, and too often the Governor’s ignorance of provincial affairs, combined to make them his directors. Their rule, whether wise or unwise, was the rule of a strict oligarchy. It was contrary to the whole spirit of Anglo-Saxon freedom.

“Whatever shape the struggle against this oligarchy might take on from time to time—‘Judges’ Disabilities,’ ‘Civil List Bills,’ ‘Clergy Reserves’—the ultimate object aimed at by the people was the control of the Governor’s advisers. The people demanded that the Executive should be directly responsible to them; in other words, that the Executive should be chosen from among the representatives elected by the people, and should retire from office on refusal of the people to re-elect them. This claim is now admitted as an inalienable right; but in watching the stress and turmoil of the conflict by which that right was won, we must not forget that the question had two sides. The men who strove with voice and pen in the cause of Canadian freedom deserve our grateful remembrance; but we must not forget that some of them put themselves much in the wrong by violence and folly, and even, in one or two cases, were so far misled by fanaticism or personal ambition as to stain their hands with treason in the sacred name of patriotism. Their opponents, on the other hand, were not without weighty arguments in support of their position, and they included in their number many conscientious, patriotic and able men whose memories stand far above any charge of greed or self-seeking. The oligarchy in Upper Canada, on account of the close relationship between its members and the jealous ex-

* “History of Canada,” p. 259. † “History of Canada,” p. 259.

clusiveness with which their circle was guarded, came to be known as 'the Family Compact.' This title was gradually extended to the like classes existing in each of the other Provinces. In New Brunswick, indeed, it seemed hardly less appropriate than it was in the Province by the Lakes."

n Lower
Canada.

So acute did this political struggle become in Upper and Lower Canada during the fifty years after the war that it culminated in both Provinces in rebellion, and thus led directly to the writing of Lord Durham's report and thence, by a clearly logical sequence of events, to the creation of the Dominion. It is necessary, therefore, at this point to trace the course of events during those years in each of the two Provinces. In Lower Canada, as has been said already, the French Canadians had an overwhelming majority in the House of Assembly, and the English Governors were naturally in the habit of nominating the members of the Executive and Legislative Councils from the English minority. This practice, combined with a certain air of superiority habitually affected by the English minority, aggravated the purely political difficulties of the Province; though it is a remarkable fact that, until the leaders of the French majority in the Assembly began to take a course which clearly led straight to rebellion, they numbered among their supporters in the conflict with the Executive Council the majority of the English members of the Lower House. The conflict centred round the question of control of revenue. The Province had three main sources of revenue: a tax imposed under the Permanent Revenue Act of 1774 on spirits and molasses; what was known as "Casual and Territorial Revenue," derived from Crown lands and mining leases; and customs duties. The Assembly had control only over the third of these three sources; and though in 1816 it had been granted the right to pay the salaries of the nominated officials—upon the express directions of the Imperial Government—it had no means of controlling the amounts of those salaries except by demanding that the grant of such control should be a condition precedent to the passing of the Appropriation Bill. In 1820, on the accession of George the Fourth, two events occurred which were to have a combined effect in bringing the political conflict in Lower Canada to a head. Lord Dalhousie was made Governor of the Province; Louis Papineau became Speaker of the House of Assembly. The Governor had an arbitrary conception of his powers. He demanded that the Assembly should provide for the payment of official salaries by a Permanent Appropriation; that is to say, that it should give up its claim to an annual scrutiny and grant of the amounts required for such salaries. The Assembly refused. Lord Dalhousie paid the salaries out of the revenue derived from the tax on spirits and molasses and from the "Casual and Territorial Revenue." Thereupon ensued a yearly deadlock between the two Houses of the Legislature. "The Assembly amended the Council's bills; the Council threw out the amended bills; the Governor went on appropriating the permanent revenues to pay the Civil List." Finally, in 1827, after a general election, Lord Dalhousie refused to accept Papineau—the leader of the French Canadians—as Speaker of the Assembly.

This step caused an outcry which the Imperial Government could not ignore. At the same time the trouble in Upper Canada became acute. The British Parliament appointed a "Canada Committee" to inquire into the whole question. Its report applied both to Upper and Lower Canada. It recommended that the revenue derived from the spirits and molasses tax should be placed under the control of the Lower House, on condition that permanent provision should be made for the salaries of officials; that accounts should be examined by auditors appointed by the Lower House; that the Executive and Legislative Councils should be enlarged and made more representative; and that in Lower Canada the French Canadian majority should have a fair representation. These recommendations were carried out. Dalhousie was recalled. Prominent French Canadians were summoned to the Executive Council. These reforms seem to have satisfied the English representatives in the House of Assembly. They did not satisfy Papineau and his French-Canadian followers. The "Casual and Territorial Revenue" was still free from the control of the Assembly. Papineau seized on this grievance and added a demand for an elective Legislative Council. From 1831 to 1837 the majority in the Assembly refused to grant supplies unless the two conditions were complied with. In 1834 it drew up a statement of its grievances in the most violent terms called the *Ninety-two Resolutions*. They stated only the French-Canadian side of the case—as was shown by a counter-address passed by the British party in the Province—and embodied a veiled threat of rebellion. A Commission of Inquiry under Lord Gosford was sent to Canada in 1835. In 1837 its report was laid before the Imperial Parliament, and on the 16th January, 1838, Lord John Russell introduced a bill to suspend the Constitution of Lower Canada; to vest the legislative power in a special Council; and to apply £142,000 from the Provincial treasury to the payment of official salaries, which were greatly in arrears owing to the refusal of the Assembly to grant supplies and the insufficiency of the "Casual and Territorial Revenue" for the purposes of the Civil List. Meanwhile the discontent in Canada broke into open rebellion. But after some fighting at St. Denis and St. Charles the rebels were dispersed with small loss of life on either side. This was the Canadian Rebellion. Into this state of affairs Lord Durham, who was appointed Governor-General of all the Canadian Provinces under Lord John Russell's Act, was commissioned to inquire.

In Upper Canada, as we have already seen, political power was, during the years immediately following the war, in the hands of a clique known as "the Family Compact." In this Province there was no racial conflict, but political conflict was almost as bitter as that in the Lower Province. The "Family Compact," composed of men who were either themselves Loyalists or the sons of Loyalists, held the rigid views of their duty to the Crown that had been the fashion in the last days of the 18th century. Their opponents were to a large extent later settlers from America who favoured more republican theories, and whose loyalty to Canada was not alto-

The "Canada Committee."

In Upper Canada.

gether beyond question. Here the conflict centred round the question of "Clergy Reserves." These were grants of land made by the Constitutional Act of 1791 for the support of "the Protestant religion in Canada." As interpreted by the "Family Compact" this meant "for the benefit of the Church of England," and for that of no other Protestant denomination. It was not, however, till 1824 that the Reform party gained a majority in the Assembly. From that year the strife grew yearly more and more bitter. The Family Compact resorted to the traditional methods of a ruling oligarchy; they imprisoned the editors of Reform papers; passed an Act prohibiting Conventions; refused to allow Government officials to appear when summoned to the bar of the House of Assembly. The leader of the Reformers was one William Mackenzie, who had edited the first Reform newspaper in the Province. But his violence at last alienated the more moderate section of the Reform party, and their defection gave an opportunity for his expulsion from the House. He was elected again and again, and as often expelled. He then went to England, where the Colonial Secretary declared his expulsion illegal. Nevertheless the House of Assembly of Upper Canada still refused to admit him. In 1835, after a General Election, he came back as the leader of a Reform majority in the new House of Assembly. His repeated expulsion from the old House had given him a position of influence in Upper Canada almost equal to that of Louis Papineau in the Lower Province. A change of Governors did not relax the political tension. The new Governor, Sir Francis Bond Head, called three prominent Reformers to the Executive Council, but informed them that he would only ask their advice when he considered it necessary to do so. The three Reformers resigned. A new Council was formed. The Assembly passed a vote of censure upon the Governor and, for the first time in the history of Upper Canada, refused to grant supplies. The Governor dissolved the House early in 1837, and himself took part in the elections upon the ground that he was fighting for the cause of monarchy and the British connection. His efforts were successful. The Family Compact swept the Province, and Mackenzie with other leading Reformers were defeated. Heedless of this warning against disloyalty, Mackenzie hastened on to his destruction. He issued a preposterous "Declaration of the Reformers" which was scornfully repudiated by the moderate Reformers. The Governor wisely gave him the length of his tether and, declaring that the Militia of the Province were quite able to secure its loyalty, sent the regular troops to help in suppressing Papineau's rebellion in Lower Canada. In November, 1837, Mackenzie raised the standard of revolt on Navy Island in the middle of the Niagara River. The revolt was easily suppressed, and Mackenzie fled to New York State, where he was afterwards arrested and sentenced to imprisonment for eighteen months for attacking a friendly nation. Two of the other leaders of the rebellion were captured and hanged.

and Durham's
report.

Lord Durham arrived in Canada in May, 1838, as Governor-General of Upper and Lower Canada, Nova Scotia, New Brunswick

and Prince Edward Island, and as "High Commissioner for the adjustment of certain important questions depending in the said Provinces of Lower and Upper Canada respecting the form and future government of the said Provinces." Six months later he took offence at the refusal of the Imperial Government to support his action in having deported eight leaders of the rebellion to Bermuda, and resigned his commission. In those six months he had composed the report which had so beneficial an influence upon the subsequent development of Canada. He found Upper and Lower Canada suffering from the application of a theory of Colonial government which even the successful revolt of the American Colonies had not sufficed to discredit. There is ample evidence of the survival of this theory in the minds of even the more Liberal English Statesmen of the time. Thus when Lord John Russell, as Prime Minister, introduced the Bill to suspend the Constitution of Lower Canada in 1838, he referred to the Colonial demand that the Executive Council should be responsible to the House of Assembly in the following terms :—*

"I stated that there was one place in which the power of the Executive could be thus entirely controlled, and this was at the seat of the Imperial Government. If the Sovereign of this country were to select those who had the confidence of the Crown but who possessed none of the confidence of the House of Commons, there must be a speedy change in the administration, and the Constitution could only proceed in consequence of that change. But, in a Colony, if the Executive Council are only to be named according to the will of the Assembly, there is another question which arises, namely, what is to become of the orders given by the Imperial Government and the Governor of the Colony?"

And in 1840 the Duke of Wellington, speaking in the House of Lords, expressed the extreme Tory view :—

"Their Lordships might depend that local Responsible Government and the Sovereignty of Great Britain were completely incompatible."

It was the great merit of Lord Durham's report that it insisted upon the fallacy which underlay this conviction of English Statesmen that complete responsible government in the Colonies was inconsistent with the maintenance of the authority of the British Crown. But though this was the real secret of the troubles both in Upper and Lower Canada, Lord Durham did not fail to point out that in Lower Canada the political conflict had been greatly aggravated by racial differences.

"The ascendancy"—(he wrote)—"which an unjust favouritism had contributed to give to the English race in the government and the legal profession, their own superior energy, skill, and capital, secured to them in every branch of industry. They have developed the resources of the country; they have constructed or improved its means of communication; they have created its internal and foreign commerce. The entire wholesale, and a large portion of the retail trade of the Province, with the most profitable and flourishing farms, are now in the hands of this numerical minority of the population."†

And the suspension of the Constitution of the Province in 1838 had only intensified the unfortunate effects of this political and material ascendancy of the minority.

* Quoted by Mr. Holland : "*Imperium et Libertas*," p. 110.

† Quoted "*Imperium et Libertas*," p. 113.

"It is not difficult to conceive how greatly the evils, which I have described as previously existing, have been aggravated by the war; how terror and revenge nourished in each portion of the population a bitter and irreconcilable hatred to each other and to the institutions of the country. The French population, who had for some time exercised a great and increasing power through the medium of the House of Assembly, found their hopes unexpectedly prostrated in the dust. . . . Removed from all actual share in the government of their country, they brood in sullen silence over the memory of their fallen countrymen, of their burnt villages, of their ruined property, of their extinguished ascendancy and of their humbled nationality. Nor have the English inhabitants forgotten in their triumph the terror with which they suddenly saw themselves surrounded by an insurgent majority, and the incidents which alone appeared to save them from the unchecked domination of their antagonists. They find themselves still a minority in the midst of a hostile and organised people. Apprehensions of secret conspiracies and sanguinary designs haunt them unceasingly, and their only hope of safety is supposed to rest on systematically terrifying and disabling the French, and in preventing a majority of that race from ever again being predominant in any portion of the Legislature of their Province."*

Lord Durham also laid stress on the contrast between the state of the Canadian Provinces as compared with that of the American territories just over the border:—

"It is not in the difference between the larger towns on the two sides that we shall find the best evidence of our own inferiority. That painful but undeniable truth is most manifest in the country districts through which the line of national separation passes for a thousand miles. There on the side of both the Canadas, and also of Brunswick and Nova Scotia, a widely-scattered population, poor and apparently unenterprising, though hardy and industrious, separated from each other by tracts of intervening forest, without towns and markets, almost without roads, living in mean houses, drawing little more than a rude subsistence from ill-cultivated land, and, seemingly incapable of improving their condition, present the most instructive contrast to their enterprising and thriving neighbours on the American side."†

Having thus stated the position on which he had been charged to report, Lord Durham went on to suggest his remedy. Full representative government; control by the people of the Executive; the restoration of the power of the Crown to initiate money-bills in the Assembly and thus to strike a proper proportion between expenditure and revenue; these were the Constitutional remedies proposed. There remained certain inconveniences—chiefly as to customs duties, public works and means of communication—as between the two Provinces. These could only be overcome by a union of the two. Such a union would also be advantageous from a military point of view; it would foster a sentiment of common nationality; it would facilitate the administration of postal, currency and banking matters; and, finally, it would minimise the danger of giving full representation to the French-Canadian majority in the Lower Province. This last object could only be obtained by means of a full legislative union, and there was precedent for the beneficial effect of such a union in somewhat similar circumstances.

"The experience of the two unions in the British Isles may teach us how effectively the strong arm of a popular Legislature would compel the obedience of a refractory population; and the hopelessness of success would

* Quoted "*Imperium et Libertas*," p. 115.

† Quoted "*Imperium et Libertas*," p. 121.

gradually subdue the existing animosities, and incline the French-Canadian population to acquiesce in this new state of political existence. I certainly should not like to submit the French-Canadians to the rule of the identical English minority with which they have been so long contending, but from a majority, emanating from so much more extended a source, I do not think they would have any oppression or injustice to fear; and in this case, the far greater part of the majority never having been brought into previous collision, would regard them with no animosity that could warp their natural sense of equity. The endowments of the Catholic Church in Lower Canada, and the existence of all its present laws, until altered by the united Legislature, might be secured by stipulations similar to those adopted in the union between Great Britain and Scotland.”*

As it happened, the proportion of the population of the two Provinces in 1839 was very favourable to such a close legislative union as Lord Durham proposed. That of Upper Canada was estimated at 400,000, whilst the English inhabitants of Lower Canada were supposed to number 150,000 and the French 450,000. Lord Durham's report was presented to the Imperial Parliament on 11th February, 1839. In October, 1839, Lord John Russell wrote a despatch on the tenure of office which commended to Governors in Canada the principles underlying the report. “Her Majesty” [said the despatch] “has no desire to maintain any system in policy among her North American subjects which opinion condemns.” “The Governor must only oppose the wishes of the Assembly where the honour of the Crown or the interests of the Empire are deeply concerned; and the Assembly must be ready to modify some of its measures for the sake of harmony and from a reverent attachment to the authority of Great Britain.” At the end of 1839 the principles of union embodied in the report were approved both by the Interim Council in Lower Canada (where the Constitution was suspended) and by both Houses of the Legislature of Upper Canada. In both Houses the “Family Compact” were able to command a majority.

The Union Bill,
1841.

“The idea of an Executive responsible to the people”—(says Mr. Roberts†)—“was hateful to the Compact. But such an Executive was intended by the Act of Union. . . . In Lord Russell's despatches [the Governor] was required to call to his counsels and employ in the public service those persons who had obtained the general confidence and esteem of the Province; and it was declared that thereafter certain heads of departments, such as Attorney-General, Surveyor-General, Receiver-General, and other members of the Executive, would be called upon to retire from the public service when motives of public policy should require it. These principles were welcomed with joy by the Reformers; but to the Official Party they meant nothing less than defeat. Nevertheless, to the lasting honour of their loyalty be it said, they accepted the defeat. The Executive Council of Upper Canada, the very core of the Compact, . . . brought in the hateful Bill as a Government measure and carried it through the Upper House. In the Assembly, it was debated with great bitterness, but the public good and the wish of the Crown prevailed, and the measure passed.”

Thus approved, the Union Bill passed the Imperial Parliament in July, 1840, and took effect in Canada on the 10th February, 1841. Upper and Lower Canada were thus united as “Canada” under a single Legislature. The Legislative Council consisted of not fewer than twenty members, nominated by the Crown for life.

* Quoted: “*Imperium et Libertas*,” p. 133. † “History of Canada,” p. 506.

The House of Assembly consisted of eighty-four members—forty-two from each Province—elected by popular suffrage. There was also an Executive Council, composed of eight members to be selected by the Governor from both Houses. Upon appointment, those chosen from the Assembly went back to the people for re-election. A permanent Civil List of £95,000 a year was provided by the Act; but, when this was voted, the Assembly had full control over the rest of the revenue; and the Government was given the right to originate all Bills for the expenditure of public money—a return to the practice of Great Britain, as opposed to the provisions of the United States Constitution, which had been strongly advocated by Lord Durham.

The period
before Union.

As far as Canada proper (*i.e.*, the united Provinces of Upper and Lower Canada) is concerned the chief political events of the period between the Union Act of 1841 and the actual creation of the Dominion of Canada in 1867 centre round three questions. These are: firstly, the establishment of complete responsible government as a working system in the Province; secondly, the settlement of the question of "Clergy Reserves"; thirdly, the reform of the constitution of the two Houses of the Legislature. The reality of responsible government in the Province was soon brought into question. In 1842 Lord Metcalfe, who had been trained in India, became Governor-General of the Province. His ideas on the subject of patronage soon brought him into conflict with his Ministry. The Ministry resigned, and the Governor-General dissolved Parliament. Following the example of Sir Francis Bond Head, he took a strong personal part in the elections, which resulted in a small majority for a Conservative Ministry. In his speech to the new Parliament, the Governor-General said that "whilst he recognised the just power and privilege of the people to influence their rulers, he reserved to himself the selection of the Executive." But it was not till 1845 that a crucial question arose. In that year the "Rebellion Losses Bill" was passed, voting £40,000 for the compensation of persons who had suffered losses through the rebellion in Upper Canada. Then Lower Canada demanded similar compensation. A Commission—appointed to inquire—reported that £100,000 would cover the real losses. The Conservative Ministry offered £10,000. This was too little to satisfy Lower Canada, while the Loyalists of the Upper Province raised the inevitable cry that compensation was being offered to rebels. In 1847 Lord Metcalfe was succeeded as Governor-General by Lord Elgin—a son-in-law of Lord Durham—who came to the Province determined to put into practice the Constitutional ideas of his father-in-law. "I still adhere"—(he wrote to his wife)—"to my opinion that the real and effectual vindication of Lord Durham's memory and proceedings will be the success of a Governor-General of Canada who works out his views of government fairly."* The instructions given him by Lord Grey, the Colonial Secretary, gave him every opportunity of carrying out this policy. He was warned

* Quoted by Mr. Holland: "*Imperium et Libertas*" p. 140.

against identifying himself with either party ; was to choose his Executive Council from the party which had a majority in the Assembly ; was never to refuse to act upon the advice of that Council except upon matters of " very grave concern " ; and was to regard himself as a moderator and mediator between all parties. His determination to carry into effect Lord Durham's policy was soon put to the test. At the end of 1847, a General Election resulted in the victory of the Reformers. The Conservative Ministry resigned, and a Ministry including the French-Canadian leaders took its place. Early in 1849 this Ministry introduced a Bill to compensate those in the Lower Province who had suffered losses during the rebellion. The Bill met with ferocious opposition ; again the cry of " no pay to rebels " was raised, in spite of the fact that careful provisions were made that no compensation should be granted to anyone who had taken part in the rebellion. The " British " party went so far as to talk of annexation to the United States. When the Bill passed Parliament, the most strenuous efforts were made to induce Lord Elgin to veto it, or at least to reserve it for the Queen's special consideration. But the Governor-General stood firm. His assent caused an outbreak of rioting in Montreal, which was then the seat of Parliament. Lord Elgin's carriage was stoned by the mob ; Parliament House was burnt ; petitions were sent to England praying for the recall of the Governor-General and the disallowance of the Bill. But Lord Elgin's firmness had established once for all the reality of responsible government in Canada ; and the support given him by the Imperial Government, which ensured the passage of the Bill through the British Parliament, did more to convince the French-Canadians of the essential justice of British rule than would have been done by years of quiet government. Lord Elgin thus early in his term of office proved the truth of his own belief in the success of a Governor-General of Canada who would fairly work out Lord Durham's ideas of government.

The second political question of importance in Canada proper during this period was that of " Clergy Reserves." It will be remembered that under the Act of 1791 large tracts of land had been set aside for the benefit of the " Protestant Clergy." This had been interpreted by the members of the " Family Compact " in the Upper Province as applying only to the Church of England ; and, though this interpretation was afterwards extended to the Church of Scotland, it still did not apply to dissenters from either Church. In 1840 the Imperial Parliament passed an Act " recognising the claims of the Clergy of all Protestant Denominations, and empowering the Governor to sell the lands and apply one-half the proceeds, subject to the life-interests of the existing Clergy, to the Colonial Churches of England and Scotland, in proportion to their respective numbers, and to distribute the remaining half among the clergy of other Denominations." But this Act did not satisfy the inhabitants of the Province, and in 1850 the Canadian Legislature addressed the Imperial Parliament praying for the repeal of the Act of 1840 and the grant of power to the Province to deal

with the lands and their proceeds, subject to the interests of existing stipend-holders. In 1853, upon Lord Elgin's recommendation, this power was granted: the separation of Church and State was formally declared, and the balance of the Reserves, both funds and lands, was distributed among the different townships in proportion to population, for purposes of education and local improvement. Similarly in 1854 the Imperial Parliament passed a Bill allowing the Canadian Parliament to reform itself in two ways—by an increase in the number of Representatives, and by a provision for the gradual substitution of an elective for a nominated Upper House. The latter reform had not had time to come into full operation when the British North American Act of 1867 restored the principle of nomination for the Senate of the Canadian Dominion.

The Maritime
Provinces.

In the short sketch that it has been possible to give of the events leading up to, and following, Lord Durham's report, prominence has necessarily been given to Upper and Lower Canada in particular. It should not, however, be forgotten that in Nova Scotia, New Brunswick and Prince Edward Island the same problems had demanded solution; and, though in these Colonies the solution of rebellion had won no adherents, they had not escaped their share of that political strife which is the inevitable outcome of the clash of rival theories of government. In order to pick up the thread, it is perhaps sufficient to go back to Lord John Russell's despatch on the Tenure of Office in 1839. In New Brunswick this despatch was read to the Legislature by the Governor; but a motion to adopt responsible government was defeated by one vote. In Nova Scotia the Governor suppressed the despatch—thus converting it into a Charter of the rights of the Reformers. The Assembly passed a vote of no confidence in the Executive, which nevertheless refused to resign, and it was only after a protracted struggle between the Reformers and two successive Governors that responsible government was finally secured in 1848. In the same year New Brunswick accepted responsible government, on the initiative of a Conservative Ministry, which, however, never acted on the principles of responsibility; so that it was not till 1854, when a Reform Government came into power, that those principles were put into actual practice. Meanwhile, Prince Edward Island had been granted responsible government in 1851.

The Sentiment
of Union.

Beneath the struggles of the five Provinces of Canada towards their full enjoyment of responsible government, and underlying the use to which they put the power that they gained, there must always have been an instinctive consciousness of the disadvantages of disunion. The threat of the armed unity of the American States never receded from their borders. In the ceaseless boundary disputes that figure in the history of the period, the victory seems always to have gone to the American side. And in the British commercial legislation of the first half of the Nineteenth Century there is a startling disregard of the duty of protecting Canada against her formidable neighbour. To say that the British Navi-

gation Laws—with all those cumbrous restrictions which are popularly (though probably erroneously) supposed to have driven the American States into rebellion—applied to Canadian commerce up to the year 1849 is to give one striking illustration of the truth of that statement. A still more striking instance of this disregard of Canadian interests by British Statesmen is afforded by the history of Corn Law Repeal. Up till 1843 the English Corn Laws applied equally to Canada and the United States. In that year Lord Stanley's Bill admitted Canadian wheat and flour into England at a nominal duty. This meant that it paid to send American wheat to Canada to be ground for export into England as flour, whereupon a large amount of Canadian capital was invested in flour-mills. But in 1846 the abolition of the Corn Laws admitted both American and Canadian wheat into England free of duty. The result was described by Lord Elgin in memorable words :—

“ I do not think ”—(he wrote to the Secretary of State)—“ that you are blind to the hardships which Canada is now enduring, but, I must own, I doubt whether you fully appreciate their magnitude, or are aware how directly they are chargeable on Imperial legislation Stanley's Bill of 1843 attracted all the produce of the West to the St. Lawrence, and fixed all the disposable capital of the Province in grinding-mills, warehouses and forwarding establishments. Peel's Bill of 1846 drives the whole of the produce down the New York channels of communications, destroying the revenue which Canada expected to derive from canal dues and ruining at once mill-owners, forwarders and merchants. The consequence is that private property is unsaleable in Canada, and not a shilling can be raised on the credit of the Province.”

Under such an accumulation of bases for an unfavourable comparison between their own condition and that of the United States, the people of Canada were compelled to consider two alternative means of an adjustment of the balance. One was annexation by the United States ; the other was union of their own peoples under the British Crown. There can be no wonder that, for a time, sore feeling at what must have seemed callous disregard of their interests by the Imperial Government drove a certain current of public feeling towards the cataract of annexation. Canada has had no monopoly of such open sores.

“ So general is the belief ”—(wrote Lord Elgin in 1849)—“ that under the present circumstances of our commercial condition, the Colonists pay a heavy pecuniary fine for their fidelity to Great Britain, that nothing but the existence of an unwonted degree of political contentment of the masses has prevented the cry for annexation from spreading like wild-fire through the Province. . . . [The Canadians] are invited to form part of a community which is neither suffering nor free-trading, which never makes a bargain without getting at least twice as much as it gives ; a community the members of which have been within the last few weeks pouring into their multifarious places of worship to thank God that they are exempt from the ills which afflict other men, from those more especially which afflict their despised neighbours, the inhabitants of North America, who have remained faithful to the country which planted them.”

But, though obscured by commercial discontent, the national spirit of Canada—founded on a long tradition of proud loyalty and on the consciousness of the blessing of the gift of complete political freedom—was coming (to use the metaphor of Clough's

famous verse)* “silent, flooding-in.” In Canada proper the Union Act of 1841 had not resulted in any real success for responsible government. The balance of population between the Upper and Lower Province, which Lord Durham had relied on to secure the proper working of his scheme, had soon been upset by the preponderant growth of population in the Upper Province. Under the Union Act each Province had equality of representation, and as the Lower Province fell further and further behind the Upper in the numbers of its people, the complaints of the Upper Province at its under-representation in the Assembly grew always louder. In 1858 this bitterness was intensified by the abandonment of what was known as the “double-majority” principle. It had been an unwritten law of politics in the Province since the Union Act of 1841 that any measure affecting either Province in particular must be supported by a majority of the members representing that Province. This unwritten law immensely complicated the business of parliamentary government. The Baldwin Ministry, for instance, resigned office in 1851 because it was supported only by a minority of representatives of the Upper Province on a question of the jurisdiction of the Chancery Court of that Province, though it had at its back a majority of the whole House. In 1858, however, the Macdonald Ministry refused to act upon the unwritten law of the double majority. For the next six years the political history of Canada proper is a kaleidoscope of changing Ministries. Each succeeding Ministry had only a small and untrustworthy majority and did not dare to propose any measure of real public importance.

Coalition
Ministry in
Canada.

In 1864, however, after the defeat of two Governments in quick succession, a coalition between John H. Macdonald and George Brown took place. The two had been bitter opponents, and the justification for their coalition is contained in a statement read by Mr. Macdonald to Parliament :—†

“Mr. Brown stated that nothing but the extreme urgency of the present crisis, and the hope of settling the sectional troubles of the Province for ever, could in his opinion, justify their meeting together with a view to common political action. . . . Both political parties had tried in turn to govern the country, but without success, and repeated elections only arrayed sectional majorities against each other more strongly than before. Another general election at this moment presented little hope of a much altered result ; and he believed that both parties were far better prepared than they had ever been before, to look the true cause of all the difficulties firmly in the face, and endeavour to settle the representation question on an equitable and permanent basis.”

The agreement between Mr. Macdonald (as representing the Government) and Mr. Brown was finally couched in two clauses :—

“The Government are prepared to pledge themselves to bring in a measure next session, for the purpose of removing existing difficulties by introducing

* “But though the tired waves, vainly breaking,
Seem here no painful inch to gain,
Far out, through creeks and inlets making,
Comes, silent, flooding-in, the main.”

† Quoted in “Confederation of Canada,” J. H. Gray, 1872.

the Federal principle into Canada, coupled with such provision as will permit the Maritime Provinces and the North-West Territory to be incorporated into the same system of government.

"And the Government will seek, by sending representatives to the Lower Provinces, and to England, to secure the assent of those interests which are beyond the control of our own Legislature to such a measure as may enable all British North America to be united under a general Legislature based upon the Federal principle."

The terms of this coalition are interesting because they show that Canada proper had in 1864 an alternative policy to that of the complete union of all the Canadian Provinces; that is to say, the application of the Federal principle to the two Provinces alone. This gave her a great advantage when she came to confer with the other Colonies on the Federal question. The possession of such an alternative saved her from the reproach—which the opponents of Union in the other Colonies were only too ready to bring up against her—that she desired the Union of Canada only as the remedy for her internal difficulties.

As fortune would have it, the very moment of the coalition between Mr. Macdonald and Mr. Brown in Canada saw the three maritime Colonies about to come to a conference on the question of a joint agreement as to the building of an inter-Colonial railway and a combined customs tariff. With these projects Canada had till then refused to have anything to do. The Coalition Government in Canada took office in June, 1864. Early in that year the Legislatures of Nova Scotia, New Brunswick and Prince Edward Island had agreed to send representatives to a conference on railways and customs which was to take place at Charlotte Town, the capital of Prince Edward Island, during September, 1864. Thus both in Canada proper and in the Maritime Provinces the idea of at least partial union had won to the position of being looked to as a way out of existing difficulties by the end of 1864. In noticing the sudden advance made by the idea of union throughout the Canadian Colonies from 1861 to 1864, the effect of the American Civil War cannot be ignored.

First steps
towards Union.

"Very speedily"—(says a Canadian historian*)—"did the progress of events develop the necessity of a strong Government. Hitherto the long frontier of Canada had been wrapt in the most profound quiet; and while this country afforded a ready and safe asylum to Southern refugees, no obstacles were thrown in the way of the North in the purchase of remounts for its cavalry, and of other supplies. Nor, unless in very glaring cases, which could not possibly be overlooked, were any active steps taken to prevent recruits for its armies from passing out of Canada in no inconsiderable numbers. But this condition of affairs was now about to be very materially altered. Sorely pressed on all their coasts, without the remotest prospect of European intervention in their behalf, the Confederate authorities essayed, in the month of September, to effect a diversion in their favour from the Canadian frontier—to menace the defenceless borders of the Northern States, and thus, if possible, to cause a war between them and Great Britain. In pursuance of this policy, two American steamboats . . . were seized on Lake Erie by Confederate desperadoes, some of whom had been refugees in this country, with the immediate design of releasing a number of Southern prisoners confined on Johnson's Island and of destroying the Lake shipping. But beyond the seizure of these steamboats, their partial plunder and the great alarm occasioned for the moment, no other injury was inflicted.

* Mr. J. M. McMullen: "The History of Canada" Vol. II., p. 277.

Scarcely, however, had the excitement which these acts produced died away when, on the 19th of October, a body of twenty-three Southern refugees made a raid on the little Vermont town of St. Alban's, close to the Canadian frontier, shot an American citizen there, robbed its bank of 233,000 dollars in current funds, and then hastily retreated across the border. The Canadian authorities promptly arrested fourteen of these marauders, who were committed for safe keeping to the Montreal gaol. Nevertheless, our relations with the United States were now much disturbed, and it became necessary to incur a large outlay in policing the frontier with thirty Volunteer companies, in order to prevent the recurrence of further raids of a similar character. It was also deemed expedient to pass a stringent Act for the prevention of outrages on the boundary, and to enable the Governor-General to order disorderly aliens to leave the Province, or, in case of their refusal to do so, to commit them to prison during pleasure."

The Charlotte
Town Confer-
ence, 1864.

The Delegates from the three Maritime Provinces met at Charlotte Town in September, 1864. On the initiative of John D. Macdonald, eight of the Coalition Ministry of Canada went there to meet the members of the Conference. Invited to address them, they argued for two days in favour of a union of all the Canadian Colonies rather than a union merely of the Maritime Provinces such as it was the primary object of the Conference to discuss. Finally, they proposed that the Conference should suspend its deliberations upon the latter project and should meet again at Quebec, on a day to be appointed by the Governor-General, there to discuss the question of a National Union. This proposal was accepted, and the Conference broke up. Determined to make the most of their opportunities, the Canadian delegates delivered speeches both in Charlotte Town and in Halifax—the capital of Nova Scotia—strongly advocating the claims of their scheme of National Union. Of these speeches, that delivered by Mr. Brown at Halifax affords so admirable a statement of the position of Upper Canada in particular, and of the arguments for National Union in general, that a lengthy quotation may perhaps be excused, especially in view of the similarity of the present position in South Africa to that of Canada at the moment when this speech was delivered.*

"It has been said that we have had the opportunity before now of entering into Closer Union with Nova Scotia and New Brunswick, but we did not avail ourselves of it; that we were offered an inter-Colonial railway, but refused to undertake it; and that we only come now seeking union with these Provinces to escape from our own sectional difficulties at home. Now, I am a member of the Party in Canada which up to this moment has been most strenuous in its resistance to the inter-Colonial railway; and I am persuaded that there is not one man in this Assembly who, under similar circumstances, would not have acted precisely as we did. In these Lower Provinces you have all had your political troubles, but we in Canada have had sectional difficulties to distract us vastly more serious than any you have had to contend with. Our Constitution of 1840 brought together under one government two countries, peopled by two races, with different languages, different creeds and different laws and customs; and unfortunately, while making us nominally one people, it retained the line of demarcation between Upper and Lower Canada and gave the same number of representatives in Parliament to each section, without regard to their respective populations, their contributions to the general revenue, or any other consideration.

* The speech is quoted in full in "The Confederation of Canada," published in 1872 by Mr. J. H. Gray, himself one of the New Brunswick delegates to the Conference of 1864 (p. 33).

The disproportion between the two sections gradually increased, until Upper Canada has 400,000 people more than Lower Canada, and pays full three-fourths of the whole national taxation ; but all the while the Lower Canadians had equal representation with us in both Houses of Parliament. A systematic agitation for the redress of this great wrong was commenced in Upper Canada ; and as the only means of enforcing justice, we resisted all large schemes of improvement ; we refused to enter into any new undertakings involving an increase of our public debt, until a reform of our Constitutional system was obtained and we knew what our future position as a people was to be. We regarded the apparently far-off scheme of Federation of the whole Provinces as no remedy for our present wrongs, and we scouted the idea of building more railroads from the public chest until the taxpayers who were to bear the burden of their construction had their just share of control over the public purse. Long and earnestly did we fight for the justice we demanded ; but at last light broke in upon us. Parties were nearly equally balanced ; the wheels of government had nearly ceased to move ; a dead-lock was almost inevitable ; when Mr. Cartier, who wields great power in Lower Canada, boldly and manfully took the ground that this evil must be met and he would meet it. On this basis, I and two political friends, joined the administration and the existing coalition was formed, expressly for the purpose of settling justly and permanently the Constitutional relations between Upper and Lower Canada. We have agreed to a principle of settlement acceptable to a large majority of the representatives in Parliament, and, I am also persuaded, to the great mass of our people in both sections of the Province. We are pledged as a government to place before Parliament, at its next session, a Bill giving effect to the conditions of our compact ; and should the union of the whole Provinces not be proceeded with, our Canadian Reform Bill will go on and our grievances be redressed. You will therefore clearly perceive that we have not come here to seek relief from our troubles, for the remedy of our grievances is already agreed upon ; and, come what may of the larger scheme now before us, our smaller scheme will certainly be accomplished. Our sole object in coming here is to say to you : We are about to amend our Constitution ; and before finally doing so, we invite you to enter with us frankly and earnestly into the enquiry whether it would or would not be for the advantage of all the British North American Colonies to be embraced under one political system. Let us look the whole question steadily in the face. If we find it advantageous, let us act upon it ; but if not let the whole thing drop. This is the whole story of our being here ; this is the full scope and intention of our present visit."

Mr. Brown then went on to review the financial position of the Colonies, their population, their lands under cultivation, their trade, and their prospects of development.

"It needs no special wisdom"—(he said after doing this)—"to perceive that a State presenting such resources and offering such varied and lucrative employment to the immigrant and the capitalist, would at once occupy a high position and attract to it the marked attention of other countries. It would be something to be a citizen of such a State. . . . In England we should occupy a very different position from what we have ever done as separate and feeble Colonies. . . . The doubt and uncertainty as to the future of these Colonies that have hung so long and injuriously over us would be greatly modified by the union ; and our securities would sensibly feel the effect in the money market of the world. How different a position, too, would we occupy in the eyes of our American neighbours. . . . But far in advance of all other advantages would be this, that union of all the Provinces would break down all trade barriers between us, and throw open at once to all a combined market of four millions of people. You in the East would send us your fish and your coals and your West Indian produce ; while we would send you in return the flour and the grain and the meats you now buy in Boston and New York. Our merchants and manufacturers would have a new field before them—the barrister in the smallest Province would have the judicial honours of all of them before him to stimulate his ambition ; a patentee could secure his right over all British America—and,

in short, all the advantages of free intercourse which has done so much for the United States would be open to us all. One other argument there is in favour of the Union that ought with all of us to weigh most seriously, and that argument is that it would elevate the politics and politicians of our country. It would lift us above the petty strifes of small communities and give to our public affairs a degree of importance and to our leading public men a status very different from what they have heretofore occupied. On a survey of the whole case, I do think there is no doubt as to the high advantages that would result from a union of all the Colonies, provided that terms of union could be found just to all the contracting parties, and so framed as to secure harmony in the future administration of affairs. That is the unanimous conclusion of the Conference, and I am persuaded that when the facts are before the country, it is a conclusion that will be cordially endorsed by the people of all the Provinces."

The Quebec
Conference,
1864.

The date fixed for the meeting of the Conference at Quebec was the 10th October, 1864. The terms on which each Colony entered the Conference are shown to some extent by the following extracts from a statement issued by the Department of the Minister of Finance, Canada, in 1865.*

STATEMENT I.

Statement relating to the Area, Acres surveyed, and Acres disposed of, in the 5 Colonies of British North America, 1865.

Province.	Area in Sq. Miles.	Acres surveyed to December 31, 1865.	Acres disposed of by Sale or Grant, Dec. 31, 1865.
Newfoundland	40,200	—	*100,000
Nova Scotia	18,660	—	*5,748,893
New Brunswick	27,105	7,850,000	7,551,909
Prince Edward Island ..	2,100	—	*1,365,400
Canada	331,280	49,084,587	39,331,791
Total.. .. .	419,345		54,097,993

The figures marked with an asterisk () are not taken from official sources, but are believed to be approximately correct.*

There would thus remain 214,282,817 acres in the hands of the Crown.

* Printed in J. H. Gray's "Confederation of Canada," pp. 404, 405.

STATEMENT II.

Population, and its rate of Increase.

Province.	Population by last Census.	Date of that Census.	Rate of Annual Increase since previous Census, per cent.	Estimated Population, Jan., 1864, assuming same rate of increase.
Newfoundland* ..	124,288	1857	1.50	137,000
Nova Scotia ..	330,857	1861	1.82	349,300
New Brunswick ..	252,047	1861	2.60	272,780
Prince Edward Island	80,857	1861	2.07	85,992
Canada	2,507,657	1861	3.48	2,783,079
Total	3,295,706			3,628,151

* Including the Labrador shore.

The population is calculated to the end of 1863 in order to arrive at a correct estimate of the Debt, Revenue, etc., of the several Provinces per head. See Statement IV.

STATEMENT III.

Revenue, Expenditure, Debt, Imports, Duties, and Exports in 1863.

Province.	Revenue, 1863.	Expenditure, 1863.	Funded Debt, 1863: Less Sinking Fund held for its redemption.	Imports, 1863,		Exports, 1863.
				Total Value.	Total Duty.	
	Dollars.	Dollars.	Dollars.	Dollars.	Dollars.	Dollars.
Newfoundland ..	480,000	479,420	946,000	5,242,724	483,640	6,002,212
Nova Scotia ..	1,185,629	1,072,274	4,858,547	10,201,391	861,989	8,420,968
New Brunswick ..	899,991	884,613	5,702,991	7,764,824	*767,354	8,964,784
Prince Edward Island	197,384	171,718	240,573	1,428,028	145,372	1,627,540
Canada	9,760,316	10,742,807	60,355,472	45,964,493	5,169,173	41,831,532
Total, 1863 ..	12,523,320	13,350,832	72,103,583	70,601,460	7,427,528	66,847,036
Canada, 1864 ..	10,918,337	10,587,142	60,287,575	52,498,066	6,637,503	38,665,446

* There is also a duty on Exports (Lumber) of 68,634 dollars.

STATEMENT IV.

Province.	Population to the Square Mile.	Revenue per head of the Population.	Expenditure per head of the Population.	Debt per head of the Population.	Imports per head of the Population.	Duty per head of the Population.	Exports per head of the Population.
		\$ c.	\$ c.	\$ c.	\$ c.	\$ c.	\$ c.
Newfoundland	3'41	3 50	3 49	6 90	38 27	3 53	43 81
Nova Scotia	18'72	3 39	3 10	13 91	29 20	2 46	24 11
New Brunswick	10'06	3 29	3 24	20 91	28 46	2 81	32 86
Prince Edward Island ..	40'95	2 29	2 00	2 79	17 61	1 69	18 93
Canada	8'40	3 51	3 86	21 69	16 51	1 85	15 03
Average	8'32	3 45	3 68	19 83	19 18	2 04	18 42
Canada, 1864	8'69	3 79	3 67	20 93	18 23	2 30	13 42

STATEMENT V.

[The following calculation shows how the debt at which Canada is to enter the Confederation is arrived at.]

The Auditor's Statement of the Liabilities of Canada in 1863.

	Dollars.	Cents.
Debenture Debt, direct and indirect	65,238,649	21
Miscellaneous Liabilities	64,426	14
Common School Fund	1,181,958	85
Indian Fund	1,577,802	46
Banking Accounts	3,396,982	81
<i>Seigniorial Tenure.</i>		
Capital to Seigniors	2,899,711	09
Chargeable on Municipal Fund	196,719	66
On account Jesuits' Estates	140,271	87
Indemnity to Townships	891,500	00
	4,128,202	62
	75,588,022	09
<i>Less</i>		
Sinking Funds	4,883,177	11
Cash and Bank Account	2,248,891	87
Common School Fund	1,181,958	85
	8,314,027	83
<i>Leaving as Net Liabilities</i>	67,273,994	26

Under such conditions of their population, revenue, expenditure and public debt, the five Canadian Colonies met, in the person of their delegates, at Quebec on the 10th October, 1864. The Provinces of Canada proper were represented by twelve members, amongst whom were Sir E. P. Tachè, Mr. J. A. Macdonald, Mr. Cartier, Mr. George Brown and Mr. Alex. T. Galt; Nova Scotia by five, the best known being Dr. Charles Tupper; New Brunswick by seven; Newfoundland by two; and Prince Edward Island by seven. Sir E. P. Tachè was unanimously elected President of the Conference. The first work done was the decision that the proceedings should be secret, as they had been at the Conference at Charlotte Town. The reasons for this decision given by Mr. J. H. Gray—himself one of the members of the Conference—are that secrecy prevented at once outdoor pressure upon, or playing to the gallery by delegates; that it tended towards absolute freedom of discussion; and that it did away with any danger of any member being held to be bound, in a political future of changed circumstances, by opinions which he might have expressed at the Conference. Mr. Gray is of opinion that the policy of secrecy was a wise one, and he cites as an additional argument in its favour the precedent of the Philadelphia Conference of 1787, “presided over by Washington, led by Hamilton and sustained by the wisdom and experience of Franklin, then eighty-four years of age,” which drafted the Constitution of the United States. The second matter for decision was the method of voting, and here, says Mr. Gray,

“it was determined, after debate, that, inasmuch as the Canadian representation in the Convention was numerically so much greater than that of any of the other Provinces—indeed, equal to that of any two combined*—the voting in case of division should be by Provinces, and not by members; Canada, as composed of two Provinces, having two votes; thus ensuring to the smaller Provinces that in the adoption of any proposition, equal weight should be given to all. Consequently, on each particular proposition on which a difference of opinion was expressed, the representatives of each Province consulted thereon apart, determined by a majority its acceptance or rejection, and reported the result by their Chairman to the Convention.”

The Quebec Resolutions are printed as Appendix “B” to this book. It is, therefore, hardly necessary to enter in detail into their provisions, especially as the changes made when the Resolutions were embodied in the British North America Act, 1867, are fully set out towards the end of this chapter.

“It was in a very short time decided”—(says Mr. J. H. Gray)—“that a Federal in preference to a Legislative union would be best suited to the exigencies of the country; its extended area and comparatively sparse population rendering it utterly impossible that the local wants of distant districts could be attended to in the general Parliament, particularly as in several of the Provinces municipalities were not established, direct taxation was unknown, and the people were accustomed to look to their local Legislatures for all those measures which would increase the settlement, open the communications, afford education, and tend to develop the resources of their Provinces. On the second day, the outlines of a contemplated Confederation were submitted in a series of resolutions by the Hon. John A. Macdonald, substantially in accordance with the views that had been more

* This is not quite correct. New Brunswick and Prince Edward Island combined had 14 members. Canada had only 12.

generally expressed in the meeting at Charlotte Town. They were elaborated in a clear and comprehensive speech, pointing out with minuteness the distinction between the Constitution proposed and the model from which it might be supposed to have been framed—that of the United States—and claiming emphatically that it was intended to be, as far as circumstances would permit, similar to that of the Imperial Government, and recognising the Sovereign of Great Britain as its sole and only head."

Action on
the Quebec
Resolutions.

In Canada.

The delegates, having sat for eighteen days and having passed the seventy-two Resolutions, went on tour through Upper and Lower Canada preaching the adoption of their scheme of union. Everywhere they were received with enthusiasm. In February and March, 1865, the Lower and Upper Houses of the Canadian Parliament respectively carried a Resolution to the effect: "That an humble Address be presented to Her Majesty, praying that she may be graciously pleased to cause a measure to be submitted to the Imperial Parliament for the purpose of uniting the Colonies of Canada, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island in one government, with provisions based on certain resolutions which were adopted at a Conference of Delegates from the said Colonies, held at the city of Quebec on the 10th October, 1864." In neither House was this resolution passed without considerable debate. In the Lower House it was introduced by John A. Macdonald in a speech which both summarised the arguments for Union and explained the reasons for the form adopted in the Quebec Resolutions.

"When we consider"—(he said)—"the enormous saving that will be effected in the administration by one general Government—when we reflect that each of the five Colonies has a Government of its own, with a complete establishment of public departments and all the machinery required for the transaction of the business of the country—that each has a separate Executive, judicial and militia system—that each Province has a separate Ministry, including a Minister of Militia, with a complete Adjutant-General's Department—that each has a Finance Minister with a full Customs and Excise staff—that each Colony has a large and complete administrative organisation, with as many executive officers as the general Government will have—we can well understand the enormous saving that will result from a union of all the Colonies—from their having but one head and one central system.
. . . ."

And, as to the suggested form of Union:—

"The only means of solution for our difficulties was the junction of the Provinces either in a Federal or a Legislative Union. Now, as regards the comparative advantages of a Legislative and a Federal Union, I have never hesitated to state my own opinions. I have again and again stated in the House that, if practicable, I thought a Legislative Union would be preferable. I have always contended that if we could agree to have one Government and one Parliament, legislating for the whole of these peoples, it would be the best, the cheapest, the most vigorous and the strongest system of government we could adopt. But, on looking at the subject in the Conference, and discussing the matter as we did, most unreservedly, and with a desire to arrive at a satisfactory conclusion, we found that such a system was impracticable. In the first place it would not meet the assent of the people of Lower Canada, because they felt that in their position—being in a minority, with a different language, nationality and religion from the majority—in case of a junction with the other Provinces their institutions and their laws might be assailed, and their ancestral institutions, on which they prided themselves, attacked and prejudiced. It was found that any proposition which involved the absorption of the individuality of Lower Canada—if I may use the expression—would not be received with favour by her people.

We found, too, that there was as great a disinclination on the part of the various Maritime Provinces to lose their individuality, as separate political organisations, as we observed in the case of Lower Canada herself. Therefore we were forced to the conclusion that we must either abandon the idea of union altogether or devise a system of union in which the separate Provincial organisations would be in some degree preserved. So that those who were, like myself, in favour of a Legislative Union, were obliged to modify their views and accept the project of a Federal Union, as the only scheme practicable, even for the Maritime Provinces. Because, although the law of those Provinces is founded on the Common Law of England, yet every one of them has a large amount of law of its own—Colonial law framed by itself and affecting every relation of life—such as the laws of property; municipal and assessment laws; laws relating to the liberty of the subject, and to all the great interests contemplated in legislation. We found, in short, that the statutory law of the different Provinces was so varied and diversified that it was almost impossible to weld them into a Legislative Union at once."

The opposition to the Resolution thus proposed centred round three main points; firstly, the form which the proposed union was to take—it being argued that the only workable form was that which should give the largest powers to the local governments and merely a delegated authority to the general government; secondly, that there was no provision in the Quebec Resolutions as to the proposed constitutions of the local governments—a point which was at least as important as the constitution of the Federal government; and, thirdly, that no definite information had been given as to either the establishment of a permanent system of education or the construction of the inter-Colonial railway, both of which were understood to be involved in the establishment of union. This opposition, however, though elaborated in a number of lengthy speeches, had no effect upon the final result. The Resolution was carried in the Lower House by 91 votes to 33, and in the Upper House by 45 to 15.

Thus, early in the year 1865, the Canadian Parliament, without any appeal to the electorate, had adopted the Quebec Resolutions. But in the Maritime Provinces their reception was very different. In the Maritime Provinces, 1865.
In March, 1865, a general election was held in New Brunswick upon the question of the adoption of the Resolutions, with the result that the Anti-Federalist party was returned to power with a considerable majority. In Nova Scotia—where public opinion also inclined against the resolutions—the Government, warned by the result of the elections in New Brunswick, neither submitted the resolutions to Parliament nor went to the country on the question of their adoption. Nor was any action on the matter taken either in Newfoundland or Prince Edward Island during 1865.

In the year 1866, however, there was a reaction in favour of union in New Brunswick. The Legislative Council passed a resolution in favour of union. The Governor—acting in defiance of the Anti-Federalist Ministry—accepted the resolution. The Ministry resigned, and another General Election reversed the result of that of 1865. The Anti-Federalists were overwhelmed, and a Federalist Ministry came into power. Encouraged by this result, the Ministry of Nova Scotia resolved to take action upon the Quebec Resolutions. They made the mistake, however, of not

appealing to the country on the question of union ; and though a resolution in favour of union was carried through Parliament by a large majority, it was subject to the condition that the Quebec Resolutions should be amended in favour of the Maritime Provinces ; whilst the electorate in general took great offence at the neglect of the Ministry to give them an opportunity of voting on the question. This discontent was voiced two years later when the electorate of Nova Scotia registered an almost unanimous vote against the Government of 1866 at the first elections for the Dominion Parliament. The Quebec Resolutions were thus formally accepted by New Brunswick and Nova Scotia. But both Prince Edward Island and Newfoundland refused definitely to accept them.

Meanwhile in Canada the Legislature made provision, at its session in 1866, for the Local Governments and Legislatures of Upper and Lower Canada when the union should be effected.

"For the Maritime Provinces"—(says Mr. Gray*)—"no such provisions were requisite. Their Constitutions would remain in operation as before Confederation, restricted only by such limitations as would be introduced by the Imperial Act effecting the union ; but with reference to the two Canadas they were again to be reconstructed into different provinces and separately clothed with the legislative powers necessary for the management of their local affairs."

It is a curious fact that—as far as the composition of the Provincial Legislatures was concerned—Lower Canada preferred to follow the English practice and retain two Houses ; whilst Upper Canada, with its predominantly English population, declared in favour of a single Chamber.

"The Legislative Council of Lower Canada was to be composed of 24 members, appointed by the Crown for life the Speaker to be appointed by the Crown, holding office during pleasure and voting only when there was a tie ; each Councillor representing one of the 24 electoral divisions, into which Lower Canada was then divided for the purpose of representation in the Legislative Council of United Canada of that day, and residing or possessing his qualification in the division which he represented. For the Lower House, or Legislative Assembly, the existing 65 electoral divisions into which Lower Canada was then divided for representation in the House of Assembly of United Canada were retained, and a distinct provision was inserted that such number should not be altered unless both the second and third readings of any Bill to effect such alteration should be passed with the concurrence of three-fourths of the members of the said Legislative Assembly.

"The lone Assembly of Upper Canada was to be composed of 82 members representing constituencies then designated and declared.

"Provision was also made that the existing laws regulating elections then in force in United Canada, and applicable to either Upper or Lower Canada, should continue in force until altered or amended by the Legislatures newly to be constituted : provided only that the term of each House should continue for four years unless sooner dissolved by the Lieutenant-Governor of the Province to which it belonged, and that a longer period than twelve months should not intervene between any two sessions of the Legislature. . . .

"An additional resolution was also passed, providing for the adjustment of the debts, credits and liabilities, properties and assets of Upper and Lower Canada by arbitration, which was subsequently inserted in the British North America Act of 1867, but for which no provision had been made in the Quebec Resolutions."†

* "Confederation of Canada," p. 367.

† J. H. Gray : "Confederation of Canada," pp. 368, 369.

After the adoption of the Quebec Resolutions by Nova Scotia and New Brunswick early in 1866, those Provinces each appointed a delegation to proceed to England to help in the passing of the necessary Imperial Act. Canada had appointed a deputation of Ministers which had gone to England in 1865; but had been informed that the Imperial Government, whilst eager for the union of the Provinces of Canada, could not take any steps towards that end so long as the Maritime Provinces were opposed to the scheme. An Imperial despatch was sent on the 24th June, 1865, to the Lieutenant-Governor of New Brunswick setting out the advantages of union; and the Canadian deputation returned home. Canada now sent a deputation to join those from Nova Scotia and New Brunswick. A conference of the three delegations met in London on the 4th December, 1866. Mr. J. A. Macdonald presided, and the Conference sat continuously for twenty days. Certain resolutions were then agreed to and transmitted to the Secretary of State for the Colonies. They were substantially the same as the Quebec Resolutions, but differed on the following points :

The British
North America
Act, 1867.

- (1) "The entire omission of 'the Representative of the Sovereign' in the fifth resolution, relative to the command of the naval and military forces of the Dominion, it being the intention that they, though a local force, should be directly under the control of the Sovereign as the head of the Empire. This was different from the old Constitution of the Provinces, under which the Governor-General and the Lieutenant-Governors claimed, as representatives of the Queen, to exercise, and did exercise, military command over the local forces within their respective governments.
- (2) "In the sixth resolution, constituting the Legislature, the term 'Sovereign' was inserted as a distinct and co-ordinate branch of the Legislature, a proviso which under the Constitution was necessarily understood, but the declaration of which was no doubt accidentally omitted in the Quebec Resolutions.
- (3) "The eighth resolution was altered by giving to Nova Scotia and New Brunswick twelve members in the Senate instead of ten, and making provision for the reduction to ten when Prince Edward Island came into Confederation.
- (4) "In the twelfth, by making the necessary qualifications of a Senator to embrace both a continuous property possession and continuous residence in the Province for which he was appointed, except in case of an official residence at the capital.
- (5) "The twenty-third and twenty-fourth resolutions, as to the provisions for altering the electoral districts, were entirely omitted, it being considered that all necessary powers in that direction were sufficiently embraced in the general terms, giving jurisdiction to the general Parliament and Local Legislatures.
- (6) "The establishment of 'Penitentiaries' as an incident of the Criminal Code was withdrawn from the local and given to the general Government. And the power of legislating upon the 'Sea, Coast and Inland Fisheries' which, under the Quebec Resolutions, had been made concurrent, was limited exclusively to the general Parliament, while the power of legislating upon the 'Solemnisation of Marriage' was included in the property and civil rights assigned to the local Government, whereas before it had not been.
- (7) "To the provision in the 29th section, appropriating to the general Government the power of legislating for the uniformity of the laws relative to property and civil rights, was added a clause that the power of altering, repealing, or amending laws so legislated upon should thereafter remain with the general Government only."

- (8) "The pardoning power, which under the 44th Quebec Resolution was given to the Lieutenant-Governors, was restricted to cases not 'capital'—and the provisions of the 43rd, respecting education, affecting the rights and privileges of the Protestant or Catholic minorities in the two Canadas, were extended to the minorities in any Province having rights or privileges by law as to denominational schools at the time when the union went into operation. And an additional provision was made that: 'In any Province where a system of separate or dissentient schools by law obtains, or where the local Legislature may hereafter adopt a system of separate or dissentient schools, an appeal shall be to the Governor-General in Council of the general Government from the acts and decisions of the local authorities, which may affect the rights or privileges of the Protestant or Catholic minority in the matter of education, and the general Parliament shall have power in the last resort to legislate on the subject.'
- (9) "An increased subsidy, in addition to the 80 cents per head, of 80,000 dollars, 70,000 dollars, 60,000 dollars and 50,000 dollars was made severally to Upper Canada, Lower Canada, Nova Scotia and New Brunswick; and the capitation subsidy of 80 cents in both New Brunswick and Nova Scotia extended until the population reached 400,000.
- (10) "A distinct provision for an Imperial Guarantee of £3,000,000 sterling for the Inter-Colonial Railway closed the substantial distinctions between the Resolutions agreed upon at Quebec and those submitted to the Imperial Government at London.

"Upon these resolutions so submitted, certain Bills were prepared by the Conference in conjunction with the Legal Officers of Her Majesty's Government, and at a number of interviews their details were again discussed, amended and added to; until at last a Draft Bill was finally agreed upon, which subsequently became the British North America Act of 1867. This Bill, so agreed upon, was submitted to the Imperial Parliament by Her Majesty's Ministers, carried, and finally enacted on the 29th March, 1867; and, on the Proclamation made in accordance with the provisions thereof, became on the 1st July, 1867, the Constitution of Canada.

"Apart from those formal details of the Bill which were essential to its proper construction, it is only necessary to observe—firstly, that power was given—not provided for in the Resolutions—to increase the numbers of the Senate and House of Commons under certain circumstances, but with express limitations; while, secondly, no power of pardon was conceded to the Lieutenant-Governors; and, thirdly, the power of legislating upon the subject-matter of laws of the several Provinces, relating to property and civil rights, which had once been legislated upon by the general Parliament, was simply made 'unrestricted' instead of exclusive in the general Parliament."

The Proclamation declaring that the Imperial Act should come into force on 1st July, 1867, and nominating the Senate, was issued on 22nd March, 1867. Prior to the establishment of the Dominion, Acts were passed both in Nova Scotia and in New Brunswick forbidding the same individual being at the same time a member of the local Legislature and the Dominion Parliament. In Canada no such legislation was passed, and, as a matter of fact, during the first three or four years after union, the leading members of the Legislatures of Quebec and Ontario (as Lower and Upper Canada were then called) held seats in the Dominion Parliament. As a result of the Exclusion Acts in New Brunswick and Nova Scotia, the members of the local Governments and all other members of the local Legislatures who wished to be members of the Dominion Parliament resigned their seats and went to election. In New

Brunswick the members of the Government were re-elected. In Nova Scotia the electorate took its revenge upon the Government for having neglected in 1866 to submit the question of union to the people. Every member of the Ministry except Dr. Tupper was defeated; and Nova Scotia sent to the first Dominion Parliament a solid body of members pledged to agitate for her immediate severance from the Union. This demand for repeal was continued in the Nova Scotian local Legislature, which in 1868 passed a resolution demanding leave to secede from the Union, and sent Howe the Reform leader to London to press that demand upon the Imperial Government. But whilst he was away—receiving, it may be said, small attention from the British Parliament—the failure of the fisheries brought great distress upon Nova Scotia. Her need called out the help of the other Colonies, and the wealth of their assistance did much to soothe the bitterness that her people had felt at being driven into union. The agitation for repeal melted into a demand for “better terms.” “Finally the Dominion Government agreed to become responsible for a much larger portion of her debt than had been contemplated in the Act of Union, and also to pay her a subsidy of 82,698 dollars a year for ten years, to compensate for certain losses of revenue.”* Howe accepted these terms and carried the Province in favour of adhesion to the Dominion. He himself took office in the Dominion Cabinet (1869).

Thus the four Colonies—the two Canadas (now known as Quebec and Ontario), Nova Scotia, and New Brunswick—became the Dominion of Canada. In 1870 Manitoba and the North-West Territories were added to the Dominion, and in 1871 the Pacific Province of British Columbia; whilst in 1873 Prince Edward Island repented her first refusal and came into the Union. For the site of the capital the Convention of 1864 had selected Ottawa, which had already been chosen by the Queen—at the request of the Parliament of the two Canadas—as the capital of those two Provinces. The foundation-stone of the Houses of Parliament had been laid in 1860 by the Prince of Wales, and when the Conference met the buildings were nearly finished. Situated on the borderline between Quebec and Ontario, with abundant water from two rivers, and built on a lofty table-land rising in an abrupt cliff from the river bank, its position is one of great natural beauty, fit for the home of the romance of the National Unity of British North America.

Adhesions to
the Dominion.

* Roberts: ‘History of Canada,’ p. 360.

CHAPTER II.

THE GROWTH OF THE AUSTRALIAN COMMONWEALTH.

Imperial
Initiative.

The history of the growth of the Australian Commonwealth extends over a long period ; from the year 1847 when Earl Grey, then Secretary of State for the Colonies, in a despatch detailing his proposals for the creation of a new Colony—Victoria—out of the territory of New South Wales, outlined a project for the union of the scattered settlements of Australia under a central authority for the consideration of “questions which, though local as it respects the British possessions in Australia collectively, are not merely local as it respects any one of those possessions” ; to the year 1900 when the “Commonwealth of Australia Constitution Act” passed through the Imperial Parliament. It took, therefore, 53 years to form the Union of Australia. But of this long period the earlier and longer part can hardly be said to have much bearing on the formation of the union ; and the first steps, originating as they did with the Secretary of State for the Colonies, are of very slight importance. They have, however, an interest of curiosity from the standpoint of the Union of South Africa, in the parallel which they offer to the attempt of Lord Carnarvon to force Union upon the South African States in 1876. It is interesting to notice that the chief motives for Earl Grey’s proposals were a desire to avoid discrimination in any one Colony, by means of duties and imposts, against “goods, the growth, produce or manufacture” of any other Colony, and a sense of the desirability of common regulations for all the Australian Colonies upon such subjects as “the conveyance of letters and the formation of roads, railways or other internal communications traversing any two or more of such Colonies.” Although, therefore, the despatch in which the Colonial Secretary outlined his proposals was received in Australia with the most outspoken criticism and dissent, and though the draft of the Australian Colonies’ Government Bill, which was passed by the Imperial Parliament in 1850 upon the recommendation of a Committee of the Privy Council appointed to consider the proposals made by Earl Grey and the Australian criticisms upon them, was amended by the omission of all the clauses providing for the Union of the Colonies ; yet the main difficulties of union—the tariff question, regulation of inter-Colonial communications by land and water, and the representation of States in a Central Parliament—were defined and considered at the very outset of the movement. It is this instinctive insight into the

crucial elements of the problem of unity which justifies a short summary of the provisions of the Act of 1850. In its original form the Bill, after providing for the separation of Victoria from New South Wales, embodied the Committee's recommendation for a "General Assembly" consisting of the Governor-General and a single House, to be called the House of Delegates, and to consist of not more than thirty and not less than twenty members. These members were to be elected by the Legislatures of the different Colonies—the number of delegates sent by each Colony being proportionate to its population. The range of the legislative authority of the House of Delegates was strictly limited to ten subjects, defined as follows :—

- (1) Imposition of duties upon imports and exports.
- (2) Conveyance of letters.
- (3) Formation of roads, canals or railways traversing any two or more Colonies.
- (4) Erection and maintenance of beacons and lighthouses.
- (5) Imposition of dues or other charges on shipping in every port or harbour.
- (6) Establishment of a general Supreme Court, to be a Court of original jurisdiction or a Court of Appeal from any of the inferior Courts of the separate Colonies.
- (7) The determining of the extent of the jurisdiction and the forms and manner of proceeding of the Supreme Court.
- (8) Regulation of weights and measures.
- (9) Enactment of laws affecting all the Colonies represented in the General Assembly, on any subject not specifically mentioned in the preceding list, but on which the House of Delegates might be desired to legislate by addresses presented from the Legislatures of all such Colonies.
- (10) The appropriation to any of the preceding objects of such sums as may be necessary, by an equal percentage from the revenue received in all the Australian Colonies, in virtue of any enactments of the General Assembly of Australia.

The Bill, as first introduced, also provided for a uniform tariff applicable to all the Australian Colonies, the details of which were set out in a schedule. The abandonment of the provisions for a General Assembly and a uniform tariff was referred to by Earl Grey in his despatch covering the Bill as finally passed in the following words :—

"The Clauses giving power for the establishment, under certain circumstances, of a General Assembly for two or more of the Colonies were omitted from the Bill in its progress through the House of Lords. This omission was not assented to by Her Majesty's Government in consequence of any change of opinion as to the importance of the suggestions on this point which are contained in the report of the Committee of the Privy Council. But it was found on examination that the Clauses in question were liable to practical objections, to obviate which it would have been necessary to introduce amendments entering into details of legislation which there were no means of satisfactorily arranging without further communication with the Colonies.

"Her Majesty's Government have been less reluctant to abandon, for the present, this portion of the measure which they proposed, inasmuch as even in New South Wales it appeared, as far as they could collect the opinion which prevails on the subject, not to be regarded as of immediate importance, whilst in the other Colonies objections had been expressed to the creation of any such authority.

"I am not, however, the less persuaded that the want of some such central authority to regulate matters of common importance to the Australian Colonies will be felt, and probably at a very early period; but when this want is so felt, it will of itself suggest the means by which it may be met. The several Legislatures will, it is true, be unable at once to give the necessary authority to a General Assembly, because the legislative power of each is confined of necessity within its territorial limits; but if two or more of the Legislatures should find that there are objects of common interest for which it is expedient to create such an authority, they will have it in their power, if they can settle the terms of an arrangement for the purpose, to pass Acts for giving effect to it, with Clauses suspending their operation till Parliament shall have supplied the authority that is wanting. By such Acts the extent and objects of the powers which they are prepared to delegate to such a body might be defined and limited with precision, and there can be little doubt that Parliament, when applied to to give effect to an arrangement so agreed upon, would readily consent to do so."

Beginnings of
the Australian
Movement.

Although, therefore, the attempt of Earl Grey to provide for the Australian Colonies a scheme of union ready-made ended in failure, it was not without good results. The terms of the despatch announcing his failure show that he himself had recognised in 1850 that the details of such a scheme would have to be elaborated by the Colonies themselves, and that the province of the Imperial Government and Parliament would be limited to the scrutiny of details, and the setting of the seal of authority upon the scheme as a whole. This in itself marked a great advance upon the rather dictatorial attitude which Earl Grey had adopted when first advancing his proposals in 1847. But this was not all. Australian criticism upon Earl Grey's suggestions had made it clear that, however advantageous in the abstract a uniform tariff for all the Australian Colonies might be, and however apparent might be the theoretical advantages of a General Assembly for the whole of the Colonies, yet there were local difficulties in the adjustment of tariff rates and in the proportionate representation of each Colony, which made the establishment of a uniform tariff and of a General Assembly very difficult to achieve in the concrete. As far as the immediate future was concerned, the proposal for a General Assembly was hardly regarded by the Australians themselves in 1850 as within the scope of practical politics. This is made clear by the proposals of the Select Committees appointed by the Parliaments of the separate Colonies between 1850 and 1860. The fact that such Committees should have been appointed at all shows that Earl Grey's proposals for a scheme of Australian unity—though they had been received with uncompromising opposition—had awakened in the minds of Australians themselves some consciousness of the advantages of union in the abstract. But at that date the Australian movement towards union amounted to little more than that. The "Constitutional Committee," for instance, appointed by the Legislature of New South Wales in 1853 to prepare a draft for a new Constitution of that Colony, added to its report a paragraph pointing to the advisability of the establishment of a General Assembly for the Australian Colonies and defining the subjects with which such an Assembly should be empowered to deal; but did not attempt to suggest any method of calling the General Assembly together, or to elaborate the details

of its composition. Similarly, the Committee appointed by the Victorian Legislature in the same year and for the same object, contented itself with inserting in its report a paragraph expressing its feeling that there were "questions of such vital inter-Colonial interest that provision should be made for occasionally convoking a General Assembly for legislating on such questions as may be submitted to it by the Act of any Legislature of one of the Australian Colonies." And even when a definite scheme was outlined by a Committee appointed by the Legislature of New South Wales and was brought up for consideration in Parliament with a recommendation that a conference should be held to consider the matter of union, it was found that the representatives were so engrossed in purely Colonial affairs that the detailed proposals of the Committee were finally shelved. The movement, in fact, had scarcely progressed beyond a vague and by no means unanimous belief in the advantages of union.

That this should be so was, indeed, only to be expected. The separate Colonies had barely received their Constitutions as self-governing States under the British Crown. The period between 1850 and 1860 is the period during which responsible government was conferred on these Colonies. Thus the New South Wales Constitution Act passed the Imperial Parliament in 1855; Victoria received its Constitution in the same year; Tasmania in 1856; South Australia also in 1856. Queensland was separated from the territory of New South Wales as a Colony with responsible government in 1859. And though Western Australia was not made a self-governing Colony till 1890, a Bill to establish a Legislative Council for that Colony—two-thirds of whose members were to be elected, whilst one-third was to be nominated by the Crown—passed through the Imperial Parliament as early as 1850. Under these circumstances it was not to be expected that any of the Colonies would be in a position to contemplate a definite scheme of union. But the ideal of union at least had begun to formulate itself; and in South Australia, as in New South Wales and Victoria, Parliament appointed Committees of each House in 1857 to consider the question of Federal union. Their reports were identical in terms: they considered that the formation of a Federal Legislature would be premature at that moment, but that there were so many topics in which the Colonies had a common interest, and in which uniform legislation would be desirable, that it was expedient to adopt some measures to secure these objects. Accordingly they expressed their concurrence with the suggestion of the Victorian Committee for the holding of a Conference of the Colonies, not to bind the several Legislatures, but only to discuss and report. These recommendations were adopted by the Parliament of South Australia, and delegates were appointed to represent the Colony at any Conference which might be held.

But the history of the growth of the Australian Commonwealth is not that of a people which from the first clearly realised the advantages of union; which was always prepared to make the sacrifices necessary for the attainment of union; and which

The Tariff
Question.

gradually arrived at the practical expression of such an ideal. It is rather that of a people which at first had very little conception of the advantages of union ; which was divided by the extreme of parochial sentiment ; and which was not only not prepared to make any sacrifices for the cause of union, but did not even see that there was any sufficient justification for the making of sacrifices. It was only under pressure of the tangible disadvantages of disunion that the practical desirability of union came slowly to be recognised, and gave birth in its turn to a national desire for union as an abstract ideal. In the telling of the story of the union of Australia, therefore, there is little to be said of disinterested enthusiasm or the great aims of farseeing statesmanship. It is true that these did play their part, and that their part was not a small one, in the final achievement. But far more prominent and far more effective was the part played by hard business considerations. It was the pressure of jarring interests that compelled a compromise between Colonies whose individual prosperity was threatened by the rivalry of their neighbours. Business and not sentiment was the cradle of the Australian Commonwealth. There could be no better illustration of this than the tariff question. It was, in fact, on this very question that the first suggestions of union between the Colonies was made. And throughout the negotiations upon the question of tariffs there is one uniform factor—the position of New South Wales. The matter divides itself naturally into two parts : first, the question of the Murray River, and, secondly, the imposition of a uniform tariff for all the Australian Colonies. The Murray River question is of little importance in the history of the Australian Commonwealth except as illustrating the difficulties which had to be met and the essentially parochial attitude of the three Colonies which were vitally concerned. In so far as traffic across the river between New South Wales and Victoria was concerned, the question of the Murray River was really only a part of the larger question of a uniform tariff. But there was also the fact that the river itself was navigable, and this drew South Australia into the negotiations. It was, therefore, necessary to arrive at some agreement for the disposal between the three Colonies of the proceeds of duties collected on goods carried on the river ; and in 1855 an agreement was made and adopted by the Legislature of each of the three Colonies, that there should be no duty on goods crossing the Murray, and that on goods carried up the Murray from South Australia duty should be levied by South Australia according to the South Australian tariff, and should be divided equally between New South Wales and Victoria. This agreement—modified in 1857 by the substitution of the New South Wales for the South Australian tariff as the basis for the collection of duty—lasted till 1864, when it was denounced by New South Wales. It was succeeded by another agreement in 1865 providing for the freedom from duty of goods crossing the Murray upon the condition of payment of a fixed sum per annum by Victoria to New South Wales, whilst the duties on goods carried up the river were to be collected

by South Australia according to the Victorian tariff. This agreement expired automatically in 1872; and though a new agreement was entered into after a Conference in 1873, Victoria retired from it immediately, and all further attempts to arrive at a permanent agreement failed.

A uniform tariff, though it was never agreed upon by the Colonies, was recognised as a thing to be aimed at from the earliest days of the separation of the various Colonies from the Mother Colony of New South Wales. The subject is complicated, not only by the multiplicity of Conferences held and proposals made upon it, but also by the fact that the Imperial Government insisted on its right to control the tariffs made by separate Colonies in such a way as to forbid any differentiation in those tariffs in favour of or against any particular Colony or State. An assertion of this right was made in the Australian Colonies' Government Bill of 1850, and was perpetuated by special provisions in the Constitution granted to each Colony between 1850 and 1860. But it had been enforced earlier. Thus when in 1842 the Legislative Council of New South Wales passed an Act to admit goods the produce or manufacture of Van Dieman's Land [as Tasmania was then called] and New Zealand free of duty, Lord Stanley, then Secretary of State for the Colonies, thought the occasion of sufficient importance to justify a circular to the Governors of all the Colonies, pointing out that a policy of discrimination would involve the foreign relations and commercial treaties of Great Britain. Subsequently the Act passed by the Legislative Council of New South Wales was disallowed. The result was to discourage mutual tariff arrangements between the Australian Colonies, and to compel each Colony to go its own way. Thus, whereas Victoria became strongly Protectionist in theory and practice, and was followed by the less important Colonies, New South Wales tended equally decisively towards the theory and practice of Free Trade, and a barrier was raised across the path of the Federal movement which was the chief obstacle to union. It would serve no purpose here to trace in detail the efforts made to overcome the tariff difficulty and to settle upon a uniform tariff. The point is that the burden of inter-Colonial duties furnished one of the main stimulants towards union, whilst the almost insuperable difficulty of assimilating duties based upon the peculiar needs of each Colony and fortified by all the armaments of rival schools of economic thought, delayed and minimised the action of that stimulant. The tariff question as a motive for union carried in itself the corrective of its own energising influence. Although—in so far as it was the vital question at many Conferences, which, though abortive as far as their main object was concerned, did much to familiarise the leading men of each Colony with the problem of union—the tariff question cannot be considered merely as an obstacle to Federation.

And though it seemed hopeless to devise a settlement of the tariff question, there were other questions in considering which the disadvantages of disunion were again and again forced upon the leading men of each Colony. It was not, however, till 1883

The Federal
Council.

that any one of these questions became so urgent as to demand immediate settlement, and immediate settlement, not for any individual Colony only, but for the whole of Australia. When that demand did arise, it arose on a question which no Australian would have believed to be urgent until its urgency was actually forced on his attention by the logic of events. If there had been one element lacking in Australia which in other countries had been the element outweighing all others in the case for Union, it had been the element of defence. In America, in Switzerland, in Germany, in Canada, unity of the people for purposes of defence had been one of the primary objects of casting that unity in the iron mould of a written Constitution. But the Australian had always flattered himself that he was under no such necessity. In 1883 he received a salutary lesson upon the folly of isolated security. France and Germany began to threaten intervention in the Pacific; the former coveted the New Hebrides, the latter was believed to have designs on New Guinea. In the case of New Guinea, the Queensland Government took the obvious course of forestalling German intervention by occupation in the name of the Queen, and found itself abandoned by the Imperial Government, which disavowed its action. It was, in short, clear that there was no security against European intervention for Australia unless she was prepared to defend herself. Under these circumstances, men began to remember a proposal which had been made by Sir Henry Parkes, Prime Minister of New South Wales, at a Conference on the tariff question held in 1880-1881. After the inevitable disagreement on the tariff question had come to a head, the Conference passed a resolution, on the motion of Sir H. Parkes, expressing its opinion that the time had come for the creation of a Federal Council to deal with inter-Colonial matters. At the request of the Conference, the New South Wales Government prepared a Bill to provide for the establishment of such a Federal Council, accompanied by a memorandum written by Parkes himself in which it was explained that in his opinion the time had not come for the establishment of a Federal Constitution with a Federal Parliament, but that the time *had* come "when a number of matters of much concern to all the Colonies might be dealt with more effectually by some Federal authority than by all the Colonies separately." The memorandum added "that an organisation which would lead men to think in the direction of Federation and accustom the public mind to Federal ideas, would be the best preparation for the foundation of Federal Government." Sir H. Parkes, had, in short, come to the conclusion that it was no use at that time to expend more energy upon futile struggles for a uniform tariff, but that there were other matters upon which unity might be obtained without the bitterness and clash of interests that always marked the discussion of the tariff question. Thus placed before the Conference at Sydney in 1881, the proposal for a Federal Council did not meet with anything like unanimous approval. The question was raised as to where revenue was to be obtained for such a Council, and upon this rock the Conference

split into two equal halves—New South Wales, South Australia and Tasmania voting for the Bill; Victoria, Queensland and New Zealand against; whilst West Australia did not vote at all. As far as the Conference of 1880-1881 went, therefore, the Federal Council Bill had dropped. But in 1883 the proposal was revived. In November of that year a Convention was held at Sydney at which the seven Colonies and Fiji were represented. The first question before the Convention was the annexation of, or the establishment of a Protectorate over East New Guinea and the West Pacific Islands from the Equator to the New Hebrides in order to prevent their falling into the hands of foreign powers. The Convention then adopted a resolution in favour of a Federal Council. A Committee was appointed to draft a Bill for the purpose. As adopted by the Convention, the Bill provided for the creation of a Federal Council, to come into operation only when approved by at least four Colonies and to affect only those Colonies which had passed the Bill. Each self-governing Colony was to be represented on the Council by two members, Crown Colonies having one member each. The province of the Council was purely legislative. It had no executive powers and no control over revenue or expenditure. On seven specified matters it had original jurisdiction. They were: The relations of Australasia with the islands of the Pacific; Prevention of the influx of criminals; fisheries in Australian waters outside territorial limits; service of civil process; enforcement of judgments and of criminal process outside the limits of each Colony; extradition of offenders; custody of offenders on board Government ships outside territorial limits. On certain other matters—[defence, quarantine, patent and copyright, bills of exchange and promissory notes, weights and measures, recognition of marriage and divorce, naturalisation, status of corporations, and “any other matter of general Australasian interest with respect to which the Legislatures of the several Colonies can legislate within their own limits, and as to which it is deemed desirable that there should be a law of general application”]—the Federal Council might legislate when requested to do so by the Legislatures of two or more Colonies, such legislation only to affect the Colonies which had asked for it. It was also agreed by the delegates present at the Convention that the Bill as passed should be submitted to the separate Legislatures, which should be asked to pass addresses to the Crown praying for legislation on the lines laid down by the Bill. This was done by the Governments of Victoria, Tasmania, Queensland, South and Western Australia and Fiji, whose Legislatures approved of the Bill. But in New South Wales the Government pleaded the pressure of more important business as an excuse for not submitting the Bill to Parliament. At last the Bill was submitted, and defeated in the Lower House by one vote. In spite, however, of the defection of New South Wales and New Zealand, the Bill passed the Imperial Parliament as “the Federal Council of Australasia Act, 1885.”

Powers of the
Federal Council.

“The Federal
Council of
Australasia
Act,” 1885.

In addition to the provisions of the Bill adopted by the Convention, this Act gave any Colony power to withdraw from the Council,

and allowed the Queen, at the request of the Colonies, to increase the number of members. The Act was adopted by Victoria, Western Australia, Queensland, Tasmania and Fiji in 1885; and the first meeting of the Council was held in 1886. South Australia adopted the Act for two years in 1888. But the Council did nothing of any importance and after it had languished for some years, its last meeting was held in 1899. The Federal Council Act was finally repealed by the Commonwealth Constitution.

The Conference
of 1890.

The Federal Council was in fact still-born, owing mainly to the refusal of New South Wales to have any part in its composition or working. Yet the proposal for such a Council had come from New South Wales through the initiative of her great Prime Minister, Sir Henry Parkes; and, as the next decisive step in the progress of the idea of Australian unity was taken also on his initiative, it is necessary to account briefly for his opposition to the Federal Council as finally constituted. That opposition seems to have been due to two main causes. First, the fact that during the deliberations of the Convention which finally shaped the Federal Council Bill a fierce opposition to the proposal for a Federal Council broke out in Sydney. This opposition was based primarily on the fact that the Convention did not take the public into its confidence. As Messrs. Quick and Garran (*"Annotated Constitution of the Australian Commonwealth,"* p. 112) say in their admirable summary of the progress of the Federal movement in Australia:—

"The Convention had sat with closed doors; and it seems that at one time, in its zeal for prompt action, it had contemplated asking the Home Government to pass the Bill at once, without reference to the Legislatures. Even the agreement arrived at only gave the Legislatures the option of accepting or rejecting the scheme as it stood, and gave them no voice in deciding its details. There was a strong feeling in Sydney against making so important a Constitutional change with so little consideration; and the Bill itself was objected to because the Council, to which power was given to override the local Legislatures, was merely a small, peripatetic, and more or less irresponsible body of delegates. Objection was made, in fact, to handing over powers of Federal legislation to any less important and less representative a body than a real Federal Parliament."

And, secondly, Sir Henry Parkes had an objection to the Federal Council founded on his own view of the practicability of Federation. When he initiated the proposal for a Federal Council in 1881, he was of opinion that it was only possible to deal through a central authority with matters which were non-contentious, so that the disadvantages of disunion pointed, without any serious obstacle intervening, to the advisability of union on such matters. By 1883, however, he had come to the conclusion that it was possible to go further. The discussions on the Federal Council had aroused public interest in Federation. That had been his object in proposing such a Council; and that object having been attained, the proposal might be allowed to drop. To carry it into effect would only be to create an inefficient central body which would, by its very inefficiency, impede the growth of a real national unity. Whatever may be thought of the wisdom of this entire change of views by Sir Henry Parkes on the question of the Federal Council, there can be no doubt whatever of the sincerity of

his Federal aspirations. It was owing to his influence that New South Wales took the lead in 1889 in re-opening the discussion on the development of Australian unity apart from the Federal Council. Seizing on the occasion of a memorandum by Major-General Sir J. Bevan Edwards, who had been sent out by the Imperial Government to report on the land defences of Australia, and who advanced proposals for the consolidation of those defences under an Imperial officer subject to Federal control, Parkes telegraphed to the other Premiers suggesting a Conference on the subject. The reply of the Victorian Government pointed out the possibility of using the Federal Council for the consolidation of the defence forces. But Parkes was not content with any such proposal. In October, 1889, he delivered a great speech in which he pointed to the necessity of providing for the national defence of Australia as a sign of the advisability of "creating a great national government for all Australia," and called upon the several Parliaments to appoint delegates to attend a Convention "to devise the Constitution which would be necessary for bringing into existence a Federal Government with a Federal Parliament for the conduct of national business."

This proposal for a National Convention of delegates did not, however, command immediate support. The Governments of the other Colonies, especially that of Victoria, still insisted on pointing out that the question of defence could be quite adequately dealt with by the Federal Council. They agreed, however, to send representatives to a Conference, and with this, which he defined as "an informal meeting of the Colonies for the purposes of preliminary consultation," Parkes had, for that moment, to be content.

The Conference met at Melbourne on the 6th February, 1890. It marks a stage in the growth of the Australian Commonwealth at which it is opportune to survey the work which had already been done and to indicate the lines on which the far more important work of the immediate future was destined to proceed. There had, then, up to the year 1890, been little real progress made. The abstract ideal of Federation had been accepted with that uncritical acquiescence which always means a belief in the minds of the people that the expression in a concrete form of any ideal so regarded is not within the sphere of practical politics. Each attempt to grapple with the inter-Colonial differences of vital importance which called for settlement on national lines had been met with uncompromising opposition from the people whose interests were threatened by any compromise. There had as yet been no popular recognition of the fact that the real advantages of union entailed also a reality of sacrifice; and, even on matters of no vital importance, the attempt to apply the principle of unity had called forth all the stock objections of the parochial spirit to any form of effective Federal control. It was this which was the real cause of the ineffectiveness of the Federal Council. That Council was regarded, even by those Colonies which joined it, merely as providing machinery for the management of affairs that were without any vital interest to anyone. But the very fact of opposition to

the Federal Council showed that the ideal of Federation had at last taken definite shape ; and with the meeting of the Conference of 1890 that ideal came down from the forum [as Sir Henry Maine said of the idea of the equality of man and the French Revolution] and entered the market place.

At the Conference of 1890 Sir Henry Parkes was the leading figure. His resolution affirming the need of early union under the Crown and implying the inadequacy of the Federal Council was unanimously agreed to. The few criticisms which were advanced in the debate upon it, chiefly in the direction of asking for some more definite details as to his idea of the form which Federation should take, gave him an opportunity of defining, in reply, his political faith.*

"The main object," he said, "for which, representing New South Wales, I stand here, is to say that we desire to enter upon this work of Federation without making any condition to the advantage of ourselves, without any stipulation whatever, with a perfect preparedness to leave the proposed Convention free to devise its own scheme, and if a central Parliament comes into existence, with a perfect reliance upon its justice, upon its wisdom and upon its honour. I think I know the people of New South Wales sufficiently to speak in their name ; and I think I can answer for it that an overwhelming majority of my countrymen in that Colony will approve of the grand step being taken of uniting all the Colonies under one form of beneficent Government, and under one National Flag."

To give effect to the main resolution, the Conference also decided that if a Union was actually brought about, the remoter Australasian Colonies should be entitled to admission at times and under conditions to be agreed upon later ; that the members of the Conference should do their best to persuade their respective Legislatures to appoint delegates to a National Australasian Convention "empowered to consider and report upon an adequate scheme for a Federal Constitution" ; and that this Convention should consist of not more than seven delegates from each of the self-governing Colonies and not more than four from each of the Crown Colonies. Such being the result of the Conference, the Parliaments of the respective Colonies were asked to appoint delegates. By October, 1890, all had done so except Western Australia, which did not appoint its delegates till the end of February, 1891. The Convention met at Sydney on 2nd March, 1891.

It was as delegates to this Convention that the great leaders of Australian Federation first came definitely to the front. Sir H. Parkes, of course, as the representative of New South Wales, had long been the most prominent champion of the movement. With him came Mr. Barton, destined to take up the leadership of the movement in succession to him, and Mr. McMillan, who bore a prominent part in the Conventions of 1897-1898. *Victoria* sent Mr. Alfred Deakin and Mr. Wrixon ; *South Australia*, Mr. C. C. Kingston and Mr. J. H. Gordon ; *Tasmania*, Mr. Philip Fysh ; *Western Australia*, Mr. John Forrest ; and *New Zealand*, Sir George Gray. These are the most famous names on the roll of

* Quoted in "Annotated Constitution of Australian Commonwealth," p. 120.

delegates to the first National Australasian Convention. Sir Henry Parkes, was elected President, and before the Convention began the task of drafting a Constitution, eleven days were spent in debating a series of resolutions introduced by him "with the object of obtaining a preliminary interchange of ideas and of laying down a few guiding principles." These resolutions laid down a principle for settling each of the outstanding difficulties of Federation in so far as they had at that time appeared, and are worthy of detailed statement, inasmuch as they met with general approval among the members of the Convention and were adopted by the Committees which drew up the Commonwealth Bill finally approved by the Convention. They were as follows :—

- *(1) "That the powers and privileges and existing territorial rights of the several existing Colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.
- (2) "That the trade and intercourse between the Federated Colonies, whether by means of land carriage or coastal navigation, shall be absolutely free.
- (3) "That the power and authority to impose customs duties shall be exclusively lodged in the Federal Government and Parliament, subject to such disposal of the revenues thence derived as shall be agreed upon.
- (4) "That the military and naval defence of Australia shall be entrusted to Federal forces, under one command."

The debate on these resolutions [to which were attached certain suggested outlines of the Constitution itself] being concluded, Committees were appointed to draft the Commonwealth Bill. Their work was then submitted to the Convention as a whole, and the draft bill was approved almost exactly in the shape in which it left the hands of the Committee. No excuse need be offered for going in some detail into the provisions of the Commonwealth Bill of 1891 or for attempting to summarise the main objections which were raised in Committee to its various clauses, since it stands out as the first attempt to dispose in detail of all the difficulties of Australian Federation. The difficulties specifically dealt with by the Bill of 1891 may be conveniently divided into two broad groups :—*Constitutional Difficulties* [including representation of States in the Federal Parliament; election of members of the Federal Parliament; the relation of the two Houses in the Federal Parliament; the position of the Federal Executive; Legislative powers of the Federal Parliament; and the Amendment of the Federal Constitution]; and *Financial Difficulties* [including inter-Colonial Free Trade; the Federal Tariff; and the taking over of State Debts and Apportionment of Surplus Revenue.]

The necessity of equal representation of States in the Federal Senate was conceded at the outset; but this concession was accompanied by a demand from New South Wales that the House of Representatives should have the predominating voice in finance and in the control of the Executive. The question of State Representation thus became involved with that of the relations of the two

State
Representation.

* Quoted in Annotated Const. of Australian Commonwealth, p. 125.

Houses in the Federal Parliament. But some of the smaller States contended, not only for equal representation in the Senate, but also for equality between the powers of the Senate and those of the House of Representatives. The draft Bill of 1891 contained a provision on this point which was afterwards known as "the compromise of 1891." "The Senate was given equal power with the House of Representatives, except that Appropriation Bills and Taxation Bills were to originate in the House of Representatives alone; and that the Senate was forbidden to amend Taxation Bills or Bills 'appropriating the necessary supplies of the ordinary annual services of the Government,' or to amend any Bill 'in such a manner as to increase any proposed charge or burden on the people.' As some compensation for these restrictions, the Senate was given, with respect to Bills which it might not amend, a power to suggest amendments. That is to say, the Senate might at any stage return any such Bill to the House of Representatives with a message requesting the omission or amendment of any items therein. As a further compensation, and as a guarantee to the Senate of some measure of 'veto in detail,' Taxation Bills were to deal with taxation only, and with only one kind of taxation; and no extraordinary appropriations were to be tacked to the ordinary Appropriation Bill."* In Committee this compromise of the draft Bill was bitterly attacked by the representatives of the smaller States. It was as energetically defended by those of New South Wales and Victoria, and an amendment to give the Senate absolutely co-equal powers with the House of Representatives was finally defeated by 22 votes to 16. There had, however, been occasions when the Parliaments of the several States had come to a deadlock over the power of the Upper House to amend or reject Bills sent to them by the lower House. Especially had this been the case with the Victorian Parliament; and in Committee on the draft Bill Mr. Wrixon, ex-Attorney-General of that State, fearing that the provision for allowing the Senate to "suggest" amendments might lead to a deadlock between the two Houses of the Federal Parliament, proposed that if a "suggestion" of the Senate was declined by the House of Representatives, the Senate should be able to request a joint meeting of the two Houses, at which a majority should decide. This proposal found no favour with the Convention, but it is noticeable as the origin of the "deadlock" provisions which were brought forward again and again in the debates on Federation, and as the forerunner—though on fundamentally different lines—of the provision which was finally inserted in the Federal Constitution.

Election of,
Members.

The question of representation of States in the Senate was thus settled in favour of equal representation. The Bill provided that Senators were to be elected by the Parliaments of the several States; each State sending eight representatives to the Senate. In the House of Representatives, each State was to have one member for every 30,000 people (a number which was to be alterable by Parliament), with a minimum of four members. The number of Senators therefore would depend on the number of States joining the Federa-

* "Annotated Constitution of Australian Commonwealth," p. 132.

tion; while the number of representatives would be determined by the vote of the Federal Parliament itself. The members of the House of Representatives were to be elected by each State according to its own franchise law and upon its own electoral divisions. The Federal Parliament was not empowered to frame a uniform franchise. As to the Executive, there was no provision in the draft Bill for the direct responsibility of the Federal Ministers to the Federal Parliament, "but responsible Government was indicated by the provisions that there should be a 'Federal Executive Council' to advise the Governor-General, and that the Chief Heads of Departments should hold office during the Governor-General's pleasure, should be capable of sitting in either House of Parliament and should be members of the Federal Executive Council. The intention was [to quote Sir Samuel Griffith's words of a later date] 'so to frame the Constitution that responsible Government may—not that it must—find a place in it.' "* In Committee the draft Bill was amended so as to provide that not only the chief Heads of Departments, but also "the Queen's Ministers of State for the Commonwealth" should be members of the Executive Council.

Responsible Government.

The proposals of the Commonwealth Bill of 1891 for defining the legislative powers of the Federal Parliament were substantially the same, with a few comparatively minor omissions, as those embodied in the Commonwealth Act. They need not, therefore, be set out in detail here. But the provisions of the Bill as to amendment of the Constitution may be very briefly summarized by saying that it was proposed that any amendment should be ratified by elected State Conventions, not by direct approval of the electorate as was ultimately provided by the Federal Constitution.

Legislative Powers.

Amendment.

So much for the settlement of the Constitutional difficulties which was proposed by the Bill of 1891. The Financial Difficulties gave rise to even more debate, but on these also a compromise was finally arrived at and embodied in the Bill. This marks a great advance on all the previous efforts towards Federation. The question of a Federal tariff, for instance, had always been an insuperable difficulty. The interest of New South Wales was so totally opposed to that of Victoria that no settlement of the tariff question had as yet seemed possible. And intimately bound up with the tariff question was that of inter-Colonial Free Trade. But in proposing his preliminary resolutions, Sir Henry Parkes had used words which served to show that he was prepared to leave the local interests of his Colony, even on a matter of such vital importance as was the issue between free trade and protection, in the hands of the Federal Parliament. And such an attitude on the part of both New South Wales and Victoria was the basis of the compromise which was arrived at in the draft Bill of 1891. "The Federal Parliament was given full powers of raising money, not only by Customs and Excise, but by every other mode of taxation; and the only conditions imposed upon this power were that federal taxation must be uniform in all the Colonies, and that on the adoption of a uniform tariff, trade between the Colonies should be

The Uniform Tariff.

* "Annotated Constitution of Australian Commonwealth," p. 132.

free. Until the adoption of a federal tariff, the provincial tariffs were to remain, not only as against the outside world, but as against the States ; and after that event the power to impose Customs and Excise was to be vested exclusively in the Federal Parliament, though the States were to retain concurrent powers of raising money by every other mode of taxation.”*

State Debts and
Surplus
Revenue.

There remained one other difficulty, the question of the taking over by the Federal Parliament of the debts of the several States, and the apportionment among the several States of the surplus revenue of federated Australia. It had been provided that the Commonwealth should be given the right of collecting customs revenue for the whole of Australia, and as it was at once decided that the Commonwealth should not be saddled with the debts of the several States [the necessary expenditure of federation being thus reduced at one stroke of the pen to a comparatively insignificant figure], it was clear that the Commonwealth would have a very large surplus revenue drawn from Customs duties, to say nothing of the other possible sources of federal income. On the other hand, the several States, when deprived of the right of collecting Customs, would immediately lose their most fruitful source of income. The question, therefore, was how the surplus federal revenue from Customs should be distributed among the several States. There were two outstanding principles of distribution. The surplus might be distributed to the several States on the basis of their population, or on that of their contributions to the needs of the Federal Government. Both principles were open to serious objection. If the surplus was to be distributed in proportion to the population of the several States, it could be shown by statistics that the consumption of dutiable articles in the several States was not strictly in proportion to the numbers of their respective populations. Yet the population basis was obviously the more consonant with the federal idea. To adopt the basis of actual contribution to revenue through the consumption of dutiable articles, on the other hand, whilst it seemed fairer from the abstract point of view, would give rise to great difficulty in the keeping of books showing the relative consumption of dutiable articles by the respective States—even if such a system of book-keeping was possible at all in practice—and would be opposed on the ground that it was not consistent with the federal idea of equality between the several States as units in a Federation. The difficulty thus outlined was, throughout the movement towards Federation, one of the most serious and most frequently debated. It gave rise at the Convention of 1891 to a very grave difference of opinion. The recommendation of the Finance Committee—which favoured the population basis for distribution of the surplus revenue after the adoption of the uniform tariff, and for the apportionment of the share of the several States in Federal expenditure before the adoption of the uniform tariff ; but the contribution basis for the distribution of the surplus before the uniform tariff—was not adopted by the Constitution Committee appointed to draft the Commonwealth Bill. The

* “Annotated Constitution of Australian Commonwealth,” p. 132.

draft Bill, therefore, "provided that the federal revenue, both before and after the uniform tariff, should be applied in the first instance to paying the federal expenditure, and the surplus should be returned to the several States 'in proportion to the amount of revenue raised therein respectively,' subject to certain provisions that taxes should be 'taken to be collected' in the State where the dutiable articles were to be consumed; or, in the case of direct taxation, where the taxable property was situated."* That is to say that the population basis disappeared altogether from the draft Bill, and that the contribution basis was adopted, not only for distribution of the surplus, but also for the apportionment of the federal expenditure between the several States, and that no distinction in this respect was made between the periods before and after the adoption of the uniform tariff. In Committee these provisions of the draft Bill did not pass without criticism, and, finally, substantial alteration. An amendment making a distinction between the method of distribution of the surplus revenue and that of the apportionment of the federal expenditure between the several States, and adopting the population basis for the latter purpose, was carried. The Convention passed on to consider the principle of distributing the surplus revenue. It was objected that the contribution basis would require an account to be kept of the ultimate destination of dutiable goods—an almost impossible task—and it was urged that though the population basis might entail temporary inequality in the distribution of the surplus, that inequality would automatically correct itself in a few years. Ultimately a compromise was suggested. The contribution basis for the distribution of the surplus might be allowed to stand until and after the adoption of the uniform tariff, but the Federal Parliament might be given power to alter the basis as soon as the uniform tariff had come into operation. This compromise was inserted in the draft Bill and the difficulty of apportioning the shares of the several States in both the federal expenditure and surplus was thus settled as far as the Commonwealth Bill of 1891 could settle it.

But the discussion on the question of finance had opened the eyes of the members of the Convention to another danger. The surplus revenue of the Commonwealth—now that it had been agreed not to charge the federal revenue with the debts of the several States—would be enormous; and it was felt that there should be some guarantee in the Federal Constitution that this huge surplus would not be wastefully expended, but would be handed over to the several States for their individual purposes. The only suggestion for such a guarantee made in 1891 was that the agreement that the Commonwealth should not be charged with State debts should be modified by making the federal revenue liable for the existing public debts of the States, whilst each State would remain liable "for the amount [if any] by which its debt exceeded a fixed sum per head of its population." The alternative proposal for a guarantee to the several States by means of an obligation imposed on the Commonwealth to return some part of its revenue to them was not suggested at the Convention of 1891. And even the suggestion which was

State 7
Guarantees.

* "Annotated Constitution of Australian Commonwealth," p. 135.

made was negatived without a division. But the idea of a guarantee was not dead, and very much more importance was assigned to it in the later discussions on Federation.

Importance of
Commonwealth
Bill, 1891.

The Bill as it passed through Committee having been adopted as a whole by the Convention, it was agreed "that this Convention recommends that provision be made by the Parliaments of the several Colonies for submitting for the approval of the people of the Colonies respectively the Constitution of the Commonwealth of Australia as passed by this Convention." From the moment that this resolution was passed Federation became a practical issue—and the main practical issue—of Australian politics. The Commonwealth Bill of 1891, though it was not accepted by most of the Parliaments, was the true foundation of the fabric of the Australian Commonwealth. The issues with which it dealt were the great issues—the compromises which it proposed their deliberate solutions. From this time onwards the growth of the Commonwealth was a rapid and continuous growth. It is true that it was hampered by delays on some of the special points defined by the Bill of 1891. But those delays did little or nothing to alter the ultimate certainty of its success as a national movement.

The Popular
Movement.

The Commonwealth Bill went to the Parliaments of the several States with almost everything against it. It was the first attempt to cast into a definite mould the vague aspirations of the people towards Federation. Its various provisions were the essence of compromise and they had to face in each Parliament the criticisms of local extremists. In New South Wales especially everything seemed to combine to baffle the advocates of the adoption of the Bill. The Labour Party had just made its appearance on the political stage and was hot on the trail of urgent social legislation. The influence of Mr. G. H. Reid was cast against the Bill as throwing away the free-trade principles of the Colony; as giving excessive power to the Senate in respect of revenue, taxation and expenditure; and as making no provision in the Constitution for the establishment of responsible government. The Bill was brought up for approval by Sir Henry Parkes on 19th May, 1891, but on the 6th June he went out of office on a vote of censure. The new Parliament contained a substantial element of Labour members, and though Mr. Barton took office in the new Cabinet on the understanding that he was to have a free hand on the question of Federation, he had to fight the battle of the Bill in an unsympathetic House, with colleagues whose hearts were confessedly too much in the cause of free trade to leave much enthusiasm over for Federation. The retirement from official life, also, of Sir Henry Parkes was a severe blow to the cause; and when in October, 1893, Mr. Barton resigned from the Cabinet on quite another question there was no hope left of the "approval" of the Commonwealth Bill by the Parliament of New South Wales. This lack of enthusiasm in New South Wales affected also the other Colonies. The Victorian Parliament did actually approve of the Bill with certain amendments, the most material of which was the excision of the

power of the Senate to suggest amendments in money bills. South Australia also finally approved of the Bill with amendments, but not till December, 1892; and though Tasmania made a perfunctory attempt to discuss its provisions, nothing was actually done; whilst the Parliaments of the rest of the Colonies did not even make a pretence of discussing it. To all appearance, as far as the Legislatures were concerned, the Federation movement was dead by the end of 1893.

It is, however, a common-place of physical science that under the appearance of death germination inevitably takes place; and the vivifying effect of strong opposition is a trite lesson of political experience. The opposition to the Commonwealth Bill appeared to have triumphed throughout Australia. In reality it was the very strength of the opposition which proved the inherent vitality of the movement. A wave of financial depression passed over the Continent in the years 1892 to 1895, and community of suffering taught the lesson of community of interest. The movement towards Federation became at last a popular movement. Under the driving of economic forces the national solidarity of Australia was welded and compacted into a formidable whole, and it was seen that the opposition to the Commonwealth Bill was in essence a product of that mischievous parochialism and inter-Colonial jealousy which in times of prosperity had seemed to cost the country nothing, but in times of dearth were recognised as the height of expensive folly. Federation leagues sprung up throughout all the Colonies. Debating societies and clubs met everywhere to discuss the practicability and emphasise the advantages of Federation; and it came gradually to be seen that the hope of attaining Federation through the action of the Legislatures was a forlorn hope. Despairing of progress through their representatives, the people of Australia took the details of Federation into their own hands. On the 1st January, 1894, the Bendigo Federation League published an "Australian Federal Congress Bill," drawn up by Dr. Quick, in which the root principle was the right of the people themselves—apart from the Legislatures—to elect their own representatives to a new Federal Congress; and this proposal attracted widespread attention. In New South Wales the popular movement soon demanded official notice. In August, 1894, Mr. Reid, who had been one of the principal opponents of the Commonwealth Bill, became Prime Minister and placed Federation in the fore-front of his manifesto to his constituents. On his official programme it came second only to his free-trade policy. Replying to a deputation from the Federal League, which urged upon him the advantages of Dr. Quick's scheme, he expressed his deep approval of the idea of a Congress elected direct by the people, and promised to discuss the proposed procedure with his brother Premiers. On the 29th January, 1895, a Conference of Premiers met, at which New South Wales, Victoria, Queensland, South and West Australia and Tasmania were represented. Mr. Reid moved and carried the following resolutions :—

Vitality of the
Movement.

Conference of
Premiers, 1895.

- (1) * "That this Conference regards Federation as the great and pressing question of Australasian politics.
- (2) "That a Convention, consisting of ten representatives from each Colony, directly chosen by the electors, be charged with the duty of framing a Federal Constitution.
- (3) "That the Constitution so framed be submitted to the electors for acceptance or rejection by a direct vote.
- (4) "That such Constitution, if accepted by the electors of three or more Colonies, be transmitted to the Queen by an address from the Parliaments of those Colonies praying for the necessary legislative enactment.
- (5) "That a Bill be submitted to the Parliament of each Colony for the purpose of giving effect to the foregoing resolutions.
- (6) "That Messrs. Turner (Victoria) and Kingston (South Australia) be requested to prepare a Draft Bill for the consideration of this Conference."

The draft Bill referred to in the 6th Resolution was merely a Bill for submission to the respective Legislatures for the purpose of giving effect to the first four resolutions. The Bill adopted by the Conference was first submitted to the Parliament of New South Wales, was passed and finally received the Royal assent in December, 1895. It embodied most of the details of Dr. Quick's scheme for the reconsideration of the Federal proposals. The Convention was to be elected direct by the people; at its first session it was to frame a Constitution; this was then to be submitted for consideration and amendment to the several Legislatures; after an interval of not less than 60 and not more than 120 days, the Convention was to meet again to consider the amendments and to re-draft the Constitution, which was then to be submitted to a general referendum of the people. South Australia passed her enabling Act in December, 1895; Tasmania in January, 1896; Victoria in March, 1896. The Acts of New South Wales, Tasmania and Victoria all required a minimum number of votes for acceptance of the Constitution on the referendum. In New South Wales the minimum was fixed at 50,000,† in Tasmania at 6,000, and in Victoria at 50,000. The enabling Act passed by Western Australia in October, 1896, provided that the representatives of that State at the Convention should be elected, not by the people direct, but by both Houses of Parliament sitting together, and that the Constitution, as framed by the Convention, was only to be submitted to the people "if approved by Parliament." In Queensland it was found impossible to pass an enabling Act at all.

The Convention
of 1897.

It was decided, however, to proceed with the election of representatives from each Colony to the Convention, without waiting for Queensland; and the first session of the Convention opened at Adelaide on 22nd March, 1897. At that session New South Wales, Victoria, South and Western Australia and Tasmania were each represented by ten delegates. The session lasted till 22nd April, when a draft Constitution had been adopted. This was then sent to the several Legislatures for consideration. The next session of the Convention should have been held in not less than 120 days.

* Quoted "Annotated Constitution Australian Commonwealth," p. 158.

† Amended to 80,000 on 12th December 1897, in the interval between the Sydney and Melbourne sessions of the Convention of 1897-1898.

But as the Premiers were absent at the Colonial Conference, the next session was not begun till 2nd September, 1897, at Sydney ; and as a General Election was pending in Victoria, this session was suspended on 24th September, 1897, and was resumed at Melbourne on 20th January, 1898. This necessity for dividing the final session of the Convention into two halves resulted in a corresponding division of the main subjects of debate at that final session. Thus the Sydney session discussed the Financial Clauses, Senate Representation, the Money Bill Clauses and Deadlocks. Of these, the Financial Clauses and Deadlocks were further discussed at the Melbourne session, which also debated the River question and Railway Rates. The work of the Convention at its Sydney and Melbourne sessions must, therefore, be regarded as a whole from the point of view of the final draft of the Constitution to be submitted to the people by referendum. Such is an outline of the sessions of the Convention. Its work can be more conveniently summarised under the respective headings of the most important subjects discussed, as has been done in the case of the Convention of 1891. For convenience sake the settlement of each question will be described in each of its stages consecutively. The amendments made by the several Legislatures in the Bill drafted by the Convention at its Adelaide session can also be conveniently dealt with under the head of their respective subjects. And it should be said here that nothing beyond the baldest outline of the discussions at the three sessions of the Convention will be attempted, the object being merely to indicate the steps by which a settlement of the outstanding difficulties of Federation was finally arrived at.

The Bill drafted by the Constitutional Committee of the Convention at its Adelaide session followed the broad outlines of the Constitutional provisions of the Commonwealth Bill of 1891. An alteration was made in the name proposed for the Upper House of the Federal Legislature—"States Assembly" being substituted for "Senate." Equal representation of the several States in the Senate was retained, but it was proposed that the members of the Senate should be elected by the people instead of by the Legislatures of the several States. Instead of the proposal of the Commonwealth Bill that each member of the House of Representatives should represent 30,000 people there was a proposal for calculating the number of Representatives in such a way that it should be double the number of members of the Upper House. The Representatives were to be elected by each State according to its own franchise, but there was to be no plural voting, and the Federal Parliament was given the right to establish a Federal franchise of general application to supersede the respective franchises of the States for purposes of a Federal election.

Constitution of
the Federal
Parliament.

In Committee of the Adelaide session, these Constitutional provisions of the draft Bill were debated in detail. The name of "Senate" was restored for the Upper House. The principle of equal State representation in the Senate was again attacked and successfully defended. Manhood suffrage was suggested as the

basis of the Federal franchise, and it was finally settled that the franchise for Federal elections should be that of the several States, subject to the right of the Federal Parliament to establish a Federal franchise, but not to deprive existing State electors of their right to vote at Federal elections.

In this shape the Constitutional provisions passed to the Legislatures for consideration and amendment. New South Wales had always opposed the right of the smaller States to equal representation in the Senate. The vote of her Parliamentary representatives now showed that they were deaf to all councils of compromise on the point. The Lower House struck out the provision of the Bill for equal representation by 59 votes to 4. The Legislative Council followed the example of the Lower House. In Victoria the principle of equal representation remained intact, but both Houses suggested that the States should be divided up, for the purposes of election of Federal Senators, into single-member electorates. In South Australia Parliament declared in favour of a manhood Federal suffrage. These amendments came up for discussion at the Sydney session of the Convention. The opponents of equal State representation in the Senate made a last attack on that principle. Its supporters justified it rather as a concession necessary to secure the support of the smaller States to the Federation Bill than on the ground of abstract justice. The guarantee of equal representation was retained in the Bill, but it was made clear that this guarantee applied only to States which should be original members of the Federation. And the final debate laid stress on the fact that the principle of equal representation should have as its necessary corollary in the Commonwealth Act an efficient "deadlock" clause. The suggestion of Victoria and the amendment of South Australia were also both rejected.

Money Bills

Closely related to the provisions for the constitution of the Federal Parliament were those relating to money bills and deadlocks. Both of these were expedients for regulating the relations of the two Houses in the Federal Legislature in such a way as to keep the real control in the hands of the Lower House whilst enabling the Senate to impose at least a temporary check on Federal legislation. The Commonwealth Bill of 1891 had laid down rules for the powers of each House as to money bills which were substantially re-enacted by the Bill of 1898 in its final form. But throughout the sessions of the Convention, in which the representatives of the smaller States had a clear majority, there was a consistent tendency towards upsetting the compromise of 1891 in such a way as to give the Senate an extended power of dealing with money bills. Thus the draft Bill submitted to the Convention at its Adelaide session departed altogether from the compromise of 1891. The sole right of the Lower House to originate Bills appropriating revenue or imposing taxation was limited to Bills "having for their main object" the appropriation of revenue or the imposition of taxation, and the Senate was given the power to amend without restriction all money bills. This attempt of the representatives of the smaller States to impose their views

on Victoria and New South Wales gave rise to the most important debate of the Adelaide session. It was quite certain that without ample security for the financial predominance of the Lower House, Victoria and New South Wales would never consent to the equal representation of States in the Federal Senate. In Committee on the draft Bill Mr. Reid moved on behalf of New South Wales an amendment practically reverting to the compromise of 1891. The debate lasted two days. At the end of the first day the ranks of the representatives of the smaller States were almost unbroken. They had a majority, and it was clear that if they held together the chance of devising a Federal Constitution would be allowed to go by once more. But on the second day wiser counsels prevailed. Mr. Barton appealed to the smaller States not to take a step which the people of New South Wales and Victoria would regard as an ultimatum and which would practically destroy all prospect of union. It was pointed out, also, that there had been no sign of popular opposition in the smaller States to the compromise of 1891, and at last Mr. Reid's amendment was allowed to pass by 25 votes to 23.

The debates in the several Legislatures on the provisions of the Bill sent out by the Adelaide session as to money bills throw a curious light on the view which the Legislatures took of their functions in considering that Bill. Though it was admitted that the provisions as to money bills were vitally necessary in order to secure the support of the people of Victoria and New South Wales for the Bill on referendum, the Upper House of the Victorian Legislature claimed the full power of amendment for the Federal Senate. And though it was equally certain that the smaller States would not come into a Federal union without some guarantee of a grant to the Federal Senate of the power of at least suggesting amendments, the Lower Houses of both Victoria and New South Wales threw out the provisions as to suggestion of amendments and denied the Senate any right of amendment at all. The House of Assembly of New South Wales, indeed, went even further and extended the power of origination of money bills vested in the Federal House of Representatives to all appropriation Bills irrespective of their "main object." In South Australia both Houses agreed in giving the Federal Senate power to amend money bills, as opposed to that of suggesting amendments; and this course was followed by both Houses of the Tasmanian Legislature, which also made a suggestion—subsequently adopted by the Convention at its Sydney session—to leave out the vague words as to amendment of Bills having appropriation as their "main object," and to substitute a proviso* "that either House might originate appropriation of fines or penalties, or fees for licences or services. This secured the desired result of giving the Senate power with regard to petty appropriations without opening debatable questions as to the 'main object' of the Bill." Both Houses of the Legislature of Western Australia also claimed for the Federal Senate the power to amend taxation Bills. The position which the Sydney session

* "Annotated Constitution of Australian Commonwealth," p. 185.

of the Convention had to face was therefore this. On the money bill clauses the Legislatures of the smaller States agreed with the Legislative Councils of Victoria and New South Wales in at least maintaining the extent of power given to the Federal Senate by the Bill adopted at the Adelaide session. On the other hand, the Legislative Assemblies of Victoria and New South Wales wished to deprive the Federal Senate of all power of dealing with money bills. Under these circumstances the Sydney session of the Convention had little difficulty in agreeing to adhere to the compromise of 1891, subject to the adoption of the Tasmanian amendment.

Deadlocks.

On the question of the other expedient for limiting the power of the Federal Senate, as a corollary to the grant of equal representation, there was even more discussion. The Adelaide session of the Convention did not include in the Bill which it adopted any provision for a deadlock between the two Federal Houses, although three separate devices were laid before it. But when the Adelaide Bill went to the Legislatures, it was at once clear that the popular demand for some such device could not possibly be ignored. Here again it is to be observed that there was a very distinct difference of opinion between the Upper and Lower Houses of the several Legislatures. Thus whilst the Legislative Councils of New South Wales and Victoria made no suggestion for any deadlock provision, the House of Assembly of New South Wales inserted in the Adelaide Bill a clause providing that either House of the Federal Legislature, in the event of a disagreement, might submit the disputed measure to a "mass referendum," at which a majority of all electors voting should decide; whilst the Victorian House of Assembly "suggested three distinct schemes:—(a) That if the Senate disagreed with a Bill sent up by the other House, and if 'on that account' the House of Representatives were dissolved, and if the Bill were again sent up and disagreed with, the Governor-General might dissolve the Senate; (b) that if the Senate disagreed with any Bill sent up to it, the Governor-General might dissolve both Houses; (c) a modification of one of the proposals made at the Adelaide session for a dual referendum, the two majorities required being:—(1) a majority of the Electoral districts for the House of Representatives and (2) a majority of all the electors voting."* Similarly, the House of Assembly of South Australia voted for a deadlock scheme giving either House of the Federal Legislature the power of resolving that any matter on which there had been continued disagreement between the Houses was a matter of urgency, upon which the Governor-General might grant or refuse a dissolution or a dual referendum; whilst the Lower House of the Tasmanian Legislature suggested a scheme which was recommended to the notice of the Convention if it decided to make provision for deadlocks, but not otherwise.

When these amendments came up for consideration at the Sydney session of the Convention a great debate took place. One party was in favour of dissolution of both Houses, either consecutively or

* "Annotated Constitution of Australian Commonwealth," p. 184.

simultaneously. The other party—that representing Victoria and New South Wales—advocated some form of direct appeal to the people by means of a referendum. Between these two courses a compromise was discovered by means of the expedient of a joint session of the two Houses, and this found favour at last rather as a possible compromise than as intrinsically the best scheme. But the Sydney session did not come to any definite conclusion of the matter. It adopted two alternative schemes, though with a tacit understanding that if a majority could be obtained for the second, the first should be allowed to drop. The first expedient provided for a dissolution of the Federal House of Representatives upon disagreement between the two Houses, followed by dissolution of the Senate if there was still disagreement between it and the new House of Representatives. The second provided for a simultaneous dissolution of the two Federal Houses upon disagreement, followed (in the case of continued disagreement between the two new Houses) by a joint sitting of the two Houses at which a three-fifths majority of the combined sitting should suffice to carry the disputed measure. It should be said here that during the course of the Sydney debate the meaning of the word “deadlock”—which had up to then been understood to refer only to disagreements on money bills—was extended so as to apply to disagreements between the two Houses on any kind of Bill. When the Convention met at Melbourne, the two Sydney alternatives again come up for discussion. The larger States were still in favour of a referendum, whilst the smaller States preferred consecutive dissolution to simultaneous dissolution followed by a joint sitting. For a time it seemed as though the smaller States would persist in their view that a joint sitting should only be held after a consecutive—as opposed to a simultaneous—dissolution, and this the larger States were determined not to accept. But at last the spirit of compromise prevailed. The second Sydney alternative was adopted as it stood, and a “deadlock” provision for a simultaneous dissolution, followed by a joint sitting with a three-fifths majority requisite, passed into the final draft of the Bill.

On the question of the Federal Executive and Judicature, the Bill sent out by the Adelaide session of the Convention followed very closely the lines of the Commonwealth Bill of 1891. There were, it is true, a few alterations. Thus to the permission given to the Queen's Ministers for the Commonwealth to sit in Parliament, there was added the provision that no such Minister should hold office for more than three months without a seat in Parliament. This was important as amounting to a definite establishment of responsible Government for the Commonwealth, a thing which the authors of the Bill of 1891 had preferred to leave undefined. Similarly the name of “High Court of Australia” was substituted for “Supreme Court of Australia,” and the Bill provided for the erection of such a Court instead of leaving that work to the Federal Parliament, and also transferred jurisdiction in appeals to the High Court from the Privy Council. The clause in the Bill of 1891 requiring communications to the Queen from State-Governors to be made through the Governor-General, and that empowering the State

Executive and
Judicature.

Parliaments to determine the mode of appointment of State Governors were both omitted. Submitted to the Legislatures, these provisions of the Adelaide Bill were seriously amended by South Australia alone. In that State the House of Assembly provided for the election of Federal Ministers by both Houses for a period of three years, subject to dismissal by the vote of a joint sitting; whilst the Legislative Council proposed to make the High Court consist of one Supreme Court Judge from each State. Discussed by the Melbourne session, the only serious alteration was on the question of appeals.* “It was decided not to interfere with the existing right of appeal direct from the Supreme Courts of the States to the Privy Council, but to allow an alternative right of appeal to the High Court. Where, however, the appeal was made to the High Court, its decision was to be final, in the sense that there was no further appeal *as a matter of right* and in matters involving the interpretation of the Federal Constitution, or a State Constitution, no appeal was allowed—even *as a matter of grace*—unless the public interests of some other part of the Queen’s dominions were concerned. With this exception, there might be an appeal from the High Court to the Privy Council by special leave of the Queen in Council; but the Federal Parliament might limit the matters in which such leave could be asked.” This settlement was destined to give considerable trouble when the Commonwealth Bill was submitted to the Imperial Parliament for approval.

Amendment of
Constitution.

The Commonwealth Bill of 1891 had proposed that any amendment of the Constitution should first be passed by an absolute majority of both Houses of the Federal Legislature and should then be approved by a Convention in each State elected by the State electors for the purpose of considering the amendment. The amendment could only pass if approved by the Conventions of a majority of the States and provided that the people of the States approving were a majority of the total population of the Commonwealth. It was also to be “presented to the Governor-General for the Queen’s assent.” The Adelaide Bill materially altered the provision as to amendments. They were now to be submitted direct to the vote of the State electors (not to State Conventions) and to pass only “if the proposed alteration is approved by the electors of a majority of the States and if the people of the States whose electors approve of the alteration are also a majority of the people of the Commonwealth.” To meet the difficulty of woman’s suffrage, it was provided that where it prevailed, the number of votes cast should be halved for purposes of counting against those of other States. There was also a further provision that “an alteration by which the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, is diminished shall not become law without the consent of the electors of that State.” These provisions of the Adelaide Bill were not seriously challenged by the Legislatures; and what alterations the Legislatures did make were not accepted by the Melbourne session of the

* “Annotated Constitution of Australian Commonwealth,” p. 204.

Convention. But, as we shall see later, some further alterations were made after the Referendum of 1898 in the amendment provisions of the Adelaide Bill.

The financial clauses of the Adelaide Bill differed very considerably from the corresponding clauses of the Bill of 1891. When the work of the drafting committee came up for discussion at Adelaide it was seen that the chief difficulty, as before, lay in the basis on which the surplus revenue of the Commonwealth should be distributed among the several States. The Committee proposed to regulate this according to three distinct periods, viz., before the imposition of uniform duties; for five years after that imposition; and after the expiration of those five years. For the first period each State was to be credited with the proportion of the Commonwealth revenue collected within its borders and was to be debited with Commonwealth expenditure in proportion to contributions as far as that expenditure was incurred in respect of "the performance of services and the exercise of powers" *transferred* to the Commonwealth, but in proportion to population as far as that expenditure was in respect of the exercise of *original* Commonwealth powers. A distinction was thus drawn between Commonwealth expenditure due to the exercise of *original* and *transferred* powers, and between expenditure due to the performance of *original* and *transferred* services. For the second period this method of debiting the Federal expenditure and crediting surplus revenue to the several States was also adopted; "but with a Federal tariff and inter-Colonial free trade, the State in which customs duty was paid would not necessarily be the State in which the dutiable article was consumed; and it was therefore provided that, notwithstanding the abolition of inter-Colonial tariffs, an account should be kept of imported dutiable articles passing from one State to another, and the duty chargeable thereon should be credited to the consuming State, and not to the State in which the duty was collected."* The system of book-keeping as between the several States was thus adopted by the Committee as applicable to the second period; and the system, though it was open to very obvious objections and met at first with almost unanimous opposition, was ultimately found to be the only practicable system of computing the proportion of revenue contributed by each State during the period immediately following the adoption of the uniform tariff. For the third period all expenditure was to be charged and all surplus revenue distributed on a uniform population basis.

[The financial question was further complicated by the insertion in the draft Bill presented to the Adelaide session of the Convention of an elaborate system of guarantees in favour of the several States against over-expenditure by the Commonwealth. But for the sake of clearness it will be better to describe these later on, though their essential relation to the method of charging revenue and distributing expenditure should not be overlooked. The question of the taking over by the Commonwealth of State debts will also be considered

Financial
Clauses and
Provisions as to
State Debts.

* "Annotated Constitution of Australian Commonwealth," p. 170.

separately, and here also it is necessary to emphasise its close dependence upon the distribution of surplus revenue and the allocation of Federal expenditure.]

When the finance proposals of the Committee came up for discussion at Adelaide, the difficulty of adopting a uniform tariff without dislocating the finances of the several States was the main subject of discussion. It was quite clear that, however moderate the Federal tariff might be, it was certain to result in a considerable increase of Customs duties in New South Wales. The period immediately after the adoption of the Federal tariff was therefore the crucial period; and it was to get over this difficulty that the Committee had adopted what one of its members called "the detestable system of book-keeping." At the same time the smaller States were tied to the necessity of Customs revenue, and did not believe that the population basis would operate so unfairly as New South Wales contended. Ultimately after a conference of the Colonial Treasurers, Mr. Reid, on behalf of New South Wales, proposed a scheme for shortening the book-keeping period.

"This was based on a sliding scale, by which the apportionment of revenue, beginning on the book-keeping or contribution basis, would slide in five years to a population basis. Accounts were to be kept on the borders for one year only after the imposition of a uniform tariff. That year was to be taken as a test of the inequalities of contribution; and on the assumption that those inequalities would steadily decrease, and would disappear in five years, it was provided that the apportionment of revenue should scale down in five years from the basis shown in the test year to a population basis.

"This plan was strongly recommended to the Convention and was adopted with very little discussion. The result was that the preliminary basis, for the period prior to the uniform tariff, remained unaltered; the final basis, after five years from the uniform tariff, also remained unaltered; but for the intermediate period, instead of five years' book-keeping on the borders, there was to be only one year's book-keeping, followed by four years' scaling down from the contribution basis, which ruled before the uniform tariff, to the population basis which was to rule ultimately."

In this shape the clauses relating to allocation of expenditure and distribution of surplus revenue left the Adelaide session. As they stood, they were a compromise between the desire of New South Wales to escape the additional burden which a uniform Federal tariff would impose on her population, and that of Victoria and the smaller States to avoid losing any of the revenue which they already drew from Customs duties. The inability of such a compromise to satisfy local interests was clearly shown as soon as the Adelaide Bill went to the Legislatures. In New South Wales the House of Assembly struck out altogether the elaborate provisions of the Bill for allocating Federal expenditure and distributing Federal revenue, by an amendment which left the whole question to be settled by the Federal Parliament; whilst the Legislative Council went to the root of the matter by voting to

deprive the Federal Parliament of any right to impose taxation, and by excising from the Bill almost the whole of the financial clauses. In Victoria, criticism was less violent. The Legislative Council passed a resolution that the financial clauses of the Bill required further consideration; and the House of Assembly refused, like that of New South Wales, to agree to the proposals for allocation of expenditure and distribution of the surplus. In South Australia and Tasmania the financial clauses as a whole met with little opposition; but Western Australia objected to the population basis as the ultimate basis of distribution of surplus revenue.

It was thus clear that the main objection to the finance clauses in general came from New South Wales, and when the Sydney session of the Convention opened, the whole question of Federal finance was considered *de novo* and referred to a Finance Committee. This Committee brought up its report at the Melbourne session. As to allocation of expenditure and distribution of revenue, the report went back to the draft Bill laid before the Adelaide session. It retained the three periods—*i.e.*, that prior to the uniform tariff; that five years after its adoption; and that subsequent to those five years. As for the first period, no substantial change was made in the Adelaide Bill, as that Bill had itself made no real change in the draft laid before the Adelaide session. As for the other two periods, the sliding scale of the Adelaide Bill was dropped, and it was provided that expenditure should be allocated and surplus revenue distributed on a contribution basis—corrected by book-keeping so as to ascertain the real Colony of consumption—and that this system should be continued “until the Parliament otherwise provides.” This scheme was finally adopted by the Melbourne session, and now stands embodied in Sections 89, 93 and 94 of the Federal Constitution.

Provisions for a guarantee in favour of the several States against over-expenditure by the Commonwealth Government and for an adequate return of revenue to the several States were first introduced at the Adelaide session of the Convention. The draft Bill submitted to that session contained a clause providing that the total yearly expenditure of the Commonwealth in the exercise of its original powers should not exceed £300,000 per annum, and that the total Federal expenditure upon departments transferred to it by the several States should not exceed the revenue directly derived from such departments by more than £1,250,000 per annum. [In both cases the sums were left blank by the draft Bill and were added later.] Further, there was a guarantee that during the first five years after the imposition of a uniform tariff the *aggregate* amount to be paid to the several States for any year should not be less than the aggregate amount returned to them during the year last preceding the imposition of such a uniform tariff. These guarantees were designed to satisfy at once New South Wales, which feared that a heavy Federal expenditure would necessitate the imposition of a high Federal tariff; and the smaller States which were desirous of insuring themselves against a lower State revenue through the Customs than

State
Guarantees.

they enjoyed prior to Federation. Both guarantees were embodied in the draft Bill approved by the Adelaide session, the amounts being fixed in the case of Federal expenditure original and transferred. When, however, the Bill went to the Legislatures, New South Wales struck out both guarantees; and, though Victoria, South Australia and Tasmania accepted them, Western Australia asked for a guarantee to the several States, not collectively, but individually, of the amount of revenue to be returned. This question also was considered by the Finance Committee appointed at the Sydney session, and when its report was brought up at the Melbourne session it was found that the excision of both the Adelaide guarantees was recommended, whilst a new clause was proposed "to provide against a loss of revenue which it was feared might result during the first year of the tariff if merchants 'loaded up' dutiable goods in New South Wales in anticipation of the tariff, in the hope of making them free of the Commonwealth without paying duty. The new clause provided that such goods, on transportation into another State within a certain time after the uniform tariff, should pay the difference between the duty chargeable on importation under the uniform tariff and the duty they had already paid."* But this new clause was in no way a substitute for the Adelaide guarantees, and when the Finance Committee's report came up before the Melbourne session, the abolition of the guarantees was strongly opposed by the representatives of Victoria and the smaller Colonies. The opposition of the representatives of New South Wales to any guarantees was determined; and at first it seemed that, though there was a majority in favour of the guarantee system in the abstract, inability to agree on the form it should take would enable New South Wales to snatch a victory on this point. But at last Sir Edward Braddon of Tasmania brought forward the first draft of what was known later as the "Braddon clause." This combined the two principles of the Adelaide guarantees, without the mention of any fixed maximum for Federal expenditure. In its final form it also contained a provision as to State debts taken over by the Commonwealth. Thus it provided that out of the net Customs and Excise revenue of the Commonwealth not more than one-quarter should be spent on Federal expenditure—both original and transferred—and the remaining three-quarters should be distributed among the States, with the limitation that if any part of the debts of the several States was taken over, revenue returnable to any State might be spent in paying interest on the debts of that State which had been so taken over. In this form the Braddon clause was embodied in the draft Bill approved by the Melbourne session. It afforded one of the chief grounds for opposition to the Bill on referendum.

The "Braddon Clause."

State Debts.

There remains to be considered, of the financial clauses discussed by the Convention, the taking over of State debts. It will be remembered that in the Bill of 1891 no provision had been made for the taking over of State debts as an integral part of the establishment of a Federal Parliament, though the Bill of 1891 had contained

* "Annotated Constitution of Australian Commonwealth," p. 197.

a clause giving the Federal Parliament power "with the consent of the Parliaments of all the States to make laws for taking over and consolidating the whole or any part of the public debt of any State or States, but so that a State shall be liable to indemnify the Commonwealth in respect of the amount of a debt taken over, and that the amount of interest payable in respect of a debt shall be deducted and retained from time to time from the share of the surplus revenue of the Commonwealth, which would otherwise be payable to the State." In the draft Bill submitted to the Adelaide session this provision was substantially repeated, except that "the consent of any Parliament." was substituted for "the consent of the Parliaments of all the States," and that a provision was added that "upon any conversion or renewal of the loan representing the debt, any benefit or advantage in interest or otherwise arising therefrom shall be applied to the reduction of the debt." The consent of the several States was, however, cut out of the Adelaide Bill, as was the other addition set out above, whilst the power to take over State debts was limited to "the whole or a rateable proportion of the public debts of the States *as existing at the establishment of the Commonwealth.*" The Melbourne session of the Convention left the section of the Bill in the same state, subject to the part of the Braddon clause which enabled revenue due to any State to be applied to payment of interest on debts of that State taken over by the Commonwealth.

The fixing of Railway Rates and the regulation of river traffic Railway Rates were two of the Legislative powers of the Federal Parliament on which the Convention had much difficulty in coming to a final decision. The regulation of river traffic was a subject so entirely conditioned by the peculiar characteristics of the Australian river system that its final settlement has little more than merely local interest. The fixing of Railway Rates, on the other hand, though also greatly influenced by local considerations, has a wider bearing in view of the certainty that the same problem must face any country whose several States may endeavour to form a system of Union. The work of the Convention on this point must, therefore, be considered in some detail. In the Commonwealth Bill of 1891 a clause was inserted empowering the Federal Parliament to annul any State Law or regulation "having the effect of derogating from freedom of trade or commerce between different parts of the Commonwealth." When the Bill was under discussion the question was raised whether this clause would extend to the prevention of preferential railway rates, but all amendments designed to make the clause clearly applicable to such cases were negatived. In the draft Bill submitted to the Adelaide session of the Convention of 1897, however, there were provisions expressly designed to prevent preferential railway rates. Thus it was laid down that any State Law derogating from the freedom of inter-State trade should *ipso facto* be null and void, whilst the Federal Parliament was empowered to create an *inter-State Commission*, whose powers as to railway matters were to be limited to the control of rates and regulations "preferential in effect and made and used for the purposes of

drawing traffic to that railway from the railway of a neighbouring State." It was during the debate at the Adelaide session that the practical application of such a power vested in the inter-State Commission was clearly defined. Messrs. Quick and Garran ("Annotated Constitution of the Australian Commonwealth," p. 179) describe the situation as follows :—

"The problem was a most difficult one, involving important commercial and political interests. Under the provincial system, each Colony had re-inforced its barrier of customs-houses by a war of railway rates and railway policies. This was especially the case between New South Wales and Victoria. Each Colony had built its railway lines and arranged its rates with a view to concentrating as much trade as possible in its own capital. New South Wales, having an immensely larger area than Victoria, had tried to gather into Sydney all the trade of that area, and had built 'octopus' railways into the south-western or 'Riverina' district—taking care not to extend them quite to the Victorian border, lest some of the trade might flow the wrong way. A large area of New South Wales, however, is nearer to Melbourne than to Sydney; and Victoria ran numerous lines to the border in order to tap the trade of these outlying districts of New South Wales. Then began a system of frankly competitive rates, Victoria offering special reductions—in some cases amounting to 66 per cent.—to goods coming from across the border, while New South Wales endeavoured to retain the trade by prohibitive rates for produce travelling towards Melbourne, and by extremely tapering long-distance rates for produce travelling to Sydney. This cut-throat competition between the two railway systems was, moreover, complicated by the competition of both with river-steamers trading to South Australia. As regards the 'long-haul' rates in New South Wales, there was also the difficulty that tapering rates for long distances are required by the soundest principles of railway management; and it seemed impossible to ascertain the precise point at which it could be said that a differential rate became preferential and non-Federal in character, or the precise degree of tapering which was necessary for the development of territory, and in the interests of producer and carrier alike. The only obvious test—that of the direct profitableness or unprofitableness of the rate to the carrier—was inapplicable because the carrier, being the Government, had public and political interests which might justify it in running the railways at a loss for the public benefit."

It was in the light of this delicate situation as between New South Wales and Victoria, with South Australia holding a watching brief in the interest of her river traffic, that the Adelaide session had to deal with the control of railway rates. The question, however, proved too difficult to be settled during that session, and the Bill went to the Legislatures containing a clause establishing an Inter-State Commission charged with the duty of seeing that no State laws should derogate from the principle of inter-Colonial freedom of trade, without any limitation of its powers [as in the draft Bill] to railway rates and regulations only in so far as they were "preferential in effect, and made and used for the purpose of drawing traffic" from the railway of one State to that of another State. In the Legislatures this establishment of the Inter-State Commission passed almost unquestioned, although the House of Assembly of New South Wales struck it out of the Bill. But at the Melbourne session the question of railway rates was thoroughly re-considered; its importance, and the real necessity for a satisfactory solution of its difficulties, being very clearly recognised. At first, though there was substantial agreement on the point of Federal prohibition of unduly high rates on the railway of any

State, there was equally a tendency towards absolute disagreement as to the permissibility of very low rates framed with a view to the attraction of trade. At one time, indeed, a clause prohibiting both preferential rates and rates framed in order to attract trade was actually adopted by the Convention. But the hostility of the representatives of New South Wales to any prohibition of such low rates was uncompromising. They saw that such a prohibition would make waste iron of their railways built to a great distance from Sydney with the purpose of drawing trade to that town, and they asserted again the theoretic and practical legitimacy of tapering rates. In the end the prospect of their unreconciled hostility to any part of the Bill prevailed upon the Convention to allow all the amendments which had already been passed to be withdrawn, and the discussion began again, but with the advantage of definite knowledge as to the vital points of difference. At last a settlement was reached. Preferential rates were forbidden; but rates "necessary for development" were safe-guarded, and as to what amounted to such a necessity the Inter-State Commission was empowered to decide upon that point. To further satisfy the representatives of New South Wales, the Convention agreed to a clause proposed by Mr. Reid requiring that due consideration should be given by the Inter-State Commission to the financial responsibility incurred in connection with the construction and working expenses of State Railways. Thus while the several States retained control of their railways, that control was subject to the scrutiny of the Inter-State Commission, whose duty it was to see that the Federal principle of inter-colonial equality of trade was not violated by the State management, except in so far as the necessities of State development and of economical management justified some derogation from the literal interpretation of that principle.

Such was the work of the convention of 1897-1898 in devising a settlement of the most salient difficulties of Federal union. The next step, under the enabling Acts of New South Wales, Victoria, South Australia and Tasmania [Western Australia waited on the action of these four Colonies] was to submit the draft Constitution to a popular referendum. In New South Wales—owing to a vote of the Legislature between the Sydney and Melbourne sessions of the Convention—the requisite affirmative majority for the adoption of the Constitution, which had been fixed at 50,000 by the enabling Act, had been raised to 80,000. In Victoria it was 50,000; in Tasmania, 6,000; whilst South Australia required no minimum majority in favour of the Bill. The story of the Referendum of 1898 is soon told. In New South Wales, Victoria and Tasmania the vote took place on the 3rd June; in South Australia on the 4th June. Victoria approved the Constitution by a majority of 78,421; South Australia by a majority of 18,480; Tasmania by a majority of 9,081. But in New South Wales the forces of opposition had their stronghold. Just as the Legislature of that Colony had distinguished itself by the ferocity of its amendments to the

The First
Referendum.
1898.

Bill drafted by the Adelaide session of the Convention ; so on referendum the whole weight of a convinced repugnance to the compromises that had been agreed to by the Convention was thrown against the Constitution. Mr. G. H. Reid, the Prime Minister, though he announced that he personally would vote for the Bill, declared that he must abstain from any recommendation to the electors one way or the other. The opposition concentrated on the old lines which had entailed the ultimate rejection of the Commonwealth Bill of 1891. Equal representation in the Senate was again denounced ; the uniform Federal tariff was represented as treachery to the free trade policy of the Colony. It was asserted that Victoria had dictated her views to the Convention and that she could insist on the possession of the Federal capital. To these old objections were added denunciations of the Inter-State Commission, the Deadlock Clause, and the Braddon Clause. Led by Mr. Barton, the Federalist party in the Colony fought strenuously for the adoption of the Constitution. But though they carried the day, the majority of 5,367 fell far below the requisite 80,000.

Mr. Reid and
New South
Wales.

The Federalists in New South Wales, however, did not regard this failure to obtain the requisite majority as conclusive. They had two reasons for their view. In the first place a general election was imminent in the Colony, and it was their belief that, with the question of the adoption of the Constitution made an issue at that election, the movement in favour of adoption would gain more adherents. In the second place, Mr. Reid himself immediately after the referendum had communicated with the other Premiers inviting them to a Conference with a view to amending the Constitution in such a way as to make it more acceptable to the people of New South Wales. Though this invitation was refused, the Federalists considered that it showed that Mr. Reid was impressed by the strength of the Federalist movement in the Colony. The general election came on in July, 1898, and though Mr. Reid personally defeated Mr. Barton, his majority in Parliament was reduced to four, the result being that, whereas the old Legislature had been bitterly opposed to Federation, the new one was committed to the main principles of the Constitution, subject to certain amendments in detail. Immediately on the meeting of Parliament, these amendments were formulated in certain resolutions introduced by Mr. Reid. They included the abolition of the three-fifths majority of a joint sitting of the two Houses ; the deletion of the " Braddon Clause " ; a guarantee that the Federal capital should be within the boundaries of New South Wales ; and minor alterations in the settlement of the questions of State boundaries, river traffic, the amendment of money bills and appeals to the Privy Council. To these resolutions two additions were made during the debate in the House of Assembly, the first making detailed proposals for the amendment of the Constitutional provisions as to alterations in the Constitution, and the second stipulating that the representation of each State in the Senate should be raised

from six to eight. With these additions the resolutions passed the House of Assembly. The Legislative Council also passed them, though with substantial modifications.

The position at the end of 1898 was therefore this :—That Victoria, South Australia and Tasmania had approved of the Constitution drawn up by the Convention of 1897 to 1898 ; that Queensland, Western Australia and New Zealand stood aloof ; and that New South Wales, having refused to approve the Bill, had defined the conditions on which her approval might yet be granted. Under these circumstances, a conference of the Premiers of the six Colonies (for Queensland also sent her Prime Minister) met at Melbourne on the 29th January, 1899, to consider the suggested amendments of New South Wales. The recommendations of this Conference were of great importance, inasmuch as they marked the completion of the work of drafting the Constitution Bill. On the questions of rivers, money bills, judicial appeals and number of senators, the members of the Conference refused to make any alteration in the Constitution. They agreed, however, that the Federal capital should be in the territory of New South Wales, provided that the site was not to be within 100 miles of Sydney and that the Federal Parliament should sit at Melbourne until it met at the site decided on for the capital. They provided that no alteration in the boundaries of any State could be made without the consent of a majority of the votes cast upon the question of the alteration in the State affected. They added to the provisions of the Bill as to alteration of the Constitution a clause enabling a proposed law making such an alteration, if it twice passed either House of the Federal Legislature, but was refused by the other House, to be submitted to a national referendum. They failed to find any satisfactory substitute for the Braddon Clause, but they limited its operation to “ a period of ten years after the establishment of the Commonwealth, and thereafter until the Parliament otherwise provides,” and added a new clause empowering the Parliament, during the same period, to grant financial assistance to any State. They acquiesced in the demand of New South Wales for the abolition of the three-fifths majority at the joint sitting and replaced it by “ an absolute majority of the total number of the members of both Houses.” Lastly, they introduced a new clause for the benefit of Queensland, which provided that if she joined the Commonwealth as an original State, her Parliament might, pending Federal legislation, divide the State into electorates for the purposes of Senate elections.

Conference of
Premiers, 1899.

It was now necessary to pass an “ Enabling Act ” in each Colony providing for a further reference of the amended Constitution to the people. In New South Wales this Act provided for a Referendum, to be decided by a simple majority, and allowed a vote upon the referendum to a person qualified for registration, even if he was not actually registered. It was at first materially altered by the Legislative Council, which was at that time much below

The Second
Referendum,
1899.

its normal strength, but the Governor appointed twelve new members, and the Bill was then assented to on the 22nd April, 1899, with the provision that eight weeks should elapse before the referendum. Meanwhile South Australia had already passed her Enabling Act; Victoria and Tasmania did so soon after New South Wales; and Queensland, after a long delay, followed the example of the other four Colonies on the 19th June. This was immediately before the referendum in New South Wales, which took place on the 27th June, 1899 and resulted, in spite of a desperate last effort made by the opponents of the Constitution, in an affirmative majority of 24,679. In Victoria, South Australia and Tasmania the Constitution was affirmed by enormous majorities; and in Queensland, where the voting did not take place till the 2nd of September, the Constitution was adopted by a majority of 7,492. The total figures in the five Colonies were:—

For the Constitution	..	..	..	..	377,988
Against the Constitution	..	..	..	..	141,386
Majority	..				236,602

“These figures”—(say Messrs. Quick and Garran*)—“are a striking proof of the strength and sincerity of the national sentiment throughout the whole of Eastern Australasia; and they are also a unique testimony to the high political capacity of the Australian people. Never before have a group of self-governing, practically independent communities, without external pressure or foreign complications of any kind, deliberately chosen of their own free will to put aside their provincial jealousies and come together as one people, from a single intellectual and sentimental conviction of the folly of disunion and the advantages of nationhood. The States of America, of Switzerland, of Germany, were drawn together under the shadow of war. Even the Canadian Provinces were forced to unite by the neighbourhood of a great foreign power. But the Australian Commonwealth—the fifth great Federation of the world—came into voluntary being through a deep conviction of national unity. We may well be proud of the statesmen who constructed a Constitution which—whatever may be its faults and its shortcomings—has proved acceptable to a large majority of the people of five great communities scattered over a continent; and proud of a people who, without the compulsion of war or the fear of conquest, have succeeded in agreeing upon the terms of a binding and indissoluble social compact.”

Difficulties
the way of
Enactment.

During August, 1899, the Parliaments of four of the Colonies whose people had ratified the Constitution passed addresses to the Queen praying that it should be passed into law by the Imperial Parliament. In Victoria, South Australia and Tasmania the address met with no opposition. In New South Wales the address was passed after several nights' debate. Queensland passed a similar address shortly after her delayed referendum. It is perhaps unnecessary to enter into the details of the negotiations with the Colonial Office which preceded and accompanied the passage of the Constitution through the Imperial Parliament. They were conducted, on the side of the Colonies, by a delegation consisting

* “Annotated Constitution of Australian Commonwealth,” p. 225.

of one representative from each of the Federating Colonies, and centred mainly round three questions: Firstly, the admission of Western Australia and New Zealand into the Federation; secondly, the question whether the Australian Constitution would come under the provisions of the Colonial Laws Validity Act; and thirdly, the provisions of the Constitution as to appeals to the Privy Council. The form of the final settlement of the last of these three questions will be discussed in the chapter on appeals to the Privy Council. The second was settled by the omission of a definition of the word "Colony" in the proposed clause 6 of the Covering Clauses to the Constitution, upon which definition the difficulty raised by the Law Officers of the Crown was based.

As far as the admission of Western Australia and New Zealand was concerned, it was made clear at an early stage of the negotiations that the Imperial Government would not consent to include in the Bill to be submitted to the Imperial Parliament, any amendment to the draft Constitution upon the question of admission of any Colony. This meant that Western Australia and New Zealand must either accept the Constitution and join the Federation as original States, or must stay outside. New Zealand adopted the latter; Western Australia the former, alternative. The attitude of Western Australia had undergone a change immediately after the Constitution left the Convention in its final form. The Premier, Sir John Forrest, who had at first appeared to be prepared to recommend the acceptance of the Constitution, did not bring it before Parliament till July, 1899, after the second referendum in New South Wales had taken place. It was then referred to a Select Committee of the Assembly, whose report advocated certain amendments giving Western Australia a larger discretion in the matter of railway control and customs duties than was given her under the draft Constitution. These amendments were accepted by the Government, which proposed to submit the Constitution with the amendments to a referendum. The proposal of the Government was carried in the Lower, but defeated in the Upper, House. A deadlock thus came about, and the submission of the Constitution to the people of Western Australia was deferred until Mr. Chamberlain, who was then Colonial Secretary, clearly intimated that the Imperial Government would not amend the draft Constitution in favour of Western Australia and that she would lose the advantages of an Original State if she did not join the Federation before the Constitution Act was proclaimed by the Queen. Even then it would have been too late for Western Australia to enter the Federation as an Original State had not a clause been specially inserted in the Imperial Bill then before Parliament "providing that, if the people intimated, before the issue of the Queen's Proclamation, a desire to be included, Western Australia might join as an Original State." Thereupon the Parliament of Western Australia was summoned in haste and an Enabling Act rushed through. The referendum took place on the 31st July, 1900. The Government consented to have it taken in accordance with

Western
Australia.

the newly-extended franchise of the Colony, so that all adults—men and women—who had been twelve months in the Colony should be entitled to vote. It resulted in a majority for Federation of 25,109; and the address to the Queen was passed by both Houses of Parliament on the 21st August, 1900.

Proclamation
of the
Commonwealth.

Meanwhile the Commonwealth Act had passed the House of Lords on the 5th July, and had received the Royal Assent on the 9th July, 1900. "On the 17th September, 1900, the Queen signed the Proclamation declaring that on and after the 1st day of January, 1901, the people of New South Wales, Victoria, South Australia, Tasmania and Western Australia should be united in a Federal Commonwealth under the name of the Commonwealth of Australia."

CHAPTER III.

THE ADMINISTRATION OF THE GERMAN EMPIRE.

[This chapter is an extract from a series of articles published in the "Morning Post" during the month of June, 1908. It is reproduced here, by the kind permission of the Editor, as giving a short and vivid account of the actual working of Union in Germany.]

I.

The German Empire is a sovereign State, containing twenty-six Federal constituent parts, all of which, with the solitary exception of Alsace-Lorraine, are themselves sovereign States. This is apparently a contradiction in terms and a stumbling block to the Constitutional lawyer. It is the key to the peculiarities of the Imperial Constitution. That Constitution distributes power among three elements—the Federal Council (Bundesrat), the Imperial Chamber (Reichstag), and the Emperor; it is to the two first that all legislative functions are confined.

The Empire itself did not suddenly spring into existence out of nothing at all; it is a development of the previously existing North German Confederation, and it has never lost the traces of its federal origin. The Confederation, formed by Treaty after the Austrian War of 1866, was extended in 1870 by further Treaties so as to include the States south of the Main; at the same time, and also by an international agreement, the union changed its name from Confederation to Empire, the change of name not being accompanied by any Constitutional alteration of character. The South German States which formally entered the Union in 1870 had been previously connected with it; but that connection had been purely fiscal. The Southern States had agreed to participate in the tariff arrangements of the Confederation, and fiscal matters were accordingly handed over to a Council appointed *ad hoc*, in which all the States in the Tariff Union were represented. In 1870, When the Fiscal Union became the political union with which we are familiar, the authority of this Council was naturally extended; it became the Federal Council of the Empire. It consists of fifty-eight members, all of whom are delegates appointed by the various Governments, to whom they report, and from whom they receive instructions. The delegates have no independent authority whatever; they vote as their Governments instruct them.

The number of Prussian delegates is seventeen; Bavaria, the second State of the Empire, appoints no more than six; and most of the other States only one. Inasmuch as Prussia controls the votes of many of the smaller States, and is, in fact, sure of at least thirty votes, a Prussian proposal can never be rejected, though if the opposition be very strong it may be withdrawn. On the other hand, as Prussia possesses the right of absolute veto, granted in view of her preponderant stake in the Empire, a project to which Prussia objects cannot be carried through, even if all the thirty-one non-Prussian delegates have been instructed to support it. It is this predominance of Prussia in the Council that is responsible for the dread of the Prussianisation of the Empire, of which one hears so much in the Southern States. For the Council is a sovereign body. From the federal nature of the Empire it follows that sovereignty is wielded by the Governments of the twenty-five States acting in concert. The vehicle of concerted action is necessarily the Federal Council, on which all the State Governments as such are directly represented. Accordingly it is urged, not altogether without plausibility, that the independence of the various States is an independence in word only; that the so-called Federal Empire is a farce; and that in reality there is not the slightest check on Prussian autocracy. The objection is met by pointing out that it cannot be to the interest of Prussia to abuse her authority; that Prussia by herself is a first-class Power; and that she has invited the other German States to enter into partnership with her, though it was open to her to assert an absolute hegemony over all the States north of the Main at least. The strength of the Empire lies in the fact that it is German, not Prussian, and any attempt at Prussian domination could only weaken it, and might possibly lead to a war of secession and the inevitable reappearance of Austria in German affairs. In fact Prussian tyranny was the very thing against which Bismarck—himself a good Prussian and no democrat—was at the utmost pains to guard, and no one would surely seek to undo Bismarck's work.

There is only one way of testing the truth either of the anti-Prussian agitation or of the Prussian reply thereto, and that is by an investigation of what actually occurs in the Federal Council. That test is rendered impossible to the student of German politics by the fact that the Council meets in secret. Consequently very little is known about its operations, and that little tells both ways—in domestic affairs in favour of Prussia and in foreign affairs against her. Inasmuch as no measure can become law without receiving the assent of the Council, which is thus sovereign in legislative matters, it is the custom for all important legislation to be initiated in the Council, though, according to the Constitution, it might equally well be initiated in the Chamber. There has never been any attempt to put pressure on the opposition in the Council by getting a Bill endorsed by the representatives of the people in the Chamber. Particular care has been shown for the susceptibilities of the States in the matter of taxation. Direct Imperial taxation would clearly be an infringement of State sovereignty.

There is no clearer mark of sovereign power than the right to raise taxes. Direct Imperial taxation would place the Imperial tax collector in every State of the Empire. In no way could the State Governments make a more patent abnegation of their independent sovereignty. They would recognise an extension of Imperial authority territorially; a step would, in fact, be taken towards the transformation of the German Emperor into Emperor of Germany. Now, there is only one State that could possibly take the initiative in effecting such a transformation, and that State is Prussia. The German Emperor is King of Prussia. He is himself a Prussian, and Prussians hold the chief posts in his service. The extension of Imperial authority must therefore involve an extension of Prussian habits of thought and of action. It would thus appear that a scheme of direct Imperial taxation could not fail to commend itself to those enthusiasts for efficiency who advocate a policy of Prussianisation. According to them it is desirable in the interests of good administration to elevate Prussia at the expense of the other States. Nothing could attain this end so expeditiously as direct Imperial taxation. It would similarly appear to follow that any such scheme would meet with the bitterest opposition from all who regard Prussia as the mainstay of reaction. We should, in fact, expect to see this financial change advocated by the Right in proportion to its Conservatism and opposed by the Left in proportion to its Radicalism. If any proof be required that the establishment of the Empire turned all previously existing parties topsy-turvy it is to be found in the fact that these expectations are in reality exactly reversed. For nearly sixty years it was a maxim of German politics that the State Governments stood for absolutist reaction, and that union would inaugurate an era of progressive Liberalism. From force of habit the Conservatives oppose direct Imperial taxation as a menace to Prussian feudal ideas, while the Liberals support it as likely in some mysterious fashion to further the cause of individual liberty. The inaction of the Prussian Government is thus due, in part at least, to the political ignorance of its supporters. At the same time credit must be given to it for its scrupulous regard to the prejudices of State Governments somewhat troubled as to their future independence.

The increasing chaos of the Imperial finances makes direct Imperial taxation inevitable in the long run, and there is no doubt that Prussia could force such a measure through the Council, and that, however distasteful to the State Governments, it would not lead to any great amount of popular agitation. It is probable, indeed, that under such a system the burden of taxation would fall more lightly, because more evenly, than it does at present. In financial matters, however, every respect has been paid to particularist scruples, and the best interests of the Empire have been sacrificed to them. That similar regard has been shown to the States in other legislative enactments has been proved time and again by the result of the elections to the Reichstag. More than one legislative proposal which has passed the Council has been thrown out by the Chamber, which has then been dissolved. The

resulting elections have always proved favourable to the Imperial Government, and its majority has never been composed of Prussians alone. It might quite well have been, for of the three hundred and ninety-seven members of the Chamber two hundred and thirty-six are Prussians, giving Prussia an absolute majority of thirty-seven. In spite of this temptation to a purely Prussian policy the Government majority is, and has always been, composite. In fact, for six years Prince Bülow shocked the Prussian Conservatives, his strongest and surest supporters, by governing with the help of the Roman Catholic Centre, whose stronghold is Bavaria. The Constitution, moreover, has something to say with regard to the convocation of the Council. It is clear that when the Council is not in session the State Governments can exercise no check whatever upon the activity of the Imperial executive, all of whose members are Prussians. But the Council has never been prorogued; it has been in continuous session since the establishment of the Empire. No surer guarantee could be given of the Prussian desire to give her fellow States every opportunity of expressing their views.

It was, however, in the domain of foreign politics that Prussian aggression was especially feared. The fear was natural enough. The representative of the Empire in dealings with foreign nations is the Emperor, who is also King of Prussia. Where, then, do the other States come in? As a matter of fact, they do not come in, nor is it easy to see how their exclusion could be avoided. Led, however, by Bavaria, they attempted to assert themselves. The Council is divided into a number of Committees, and the Constitution provides that one of these Committees shall give the Imperial Chancellor information with regard to foreign affairs. Bavaria presides over this Committee, and Prussia is not represented in it. This is all very pretty on paper, but, as a matter of fact, foreign affairs are the province of the Emperor, and the Imperial Chancellor is the Minister of the Emperor, and it is through him that Imperial communications are made. It is thus impossible for the Foreign Affairs Committee to give the Chancellor any information which he has not previously given it, a fact which somewhat impairs the Committee's efficiency, and may possibly account for Bismarck's ready acceptance of the Bavarian proposal. It appears that the Committee never met at all until 1900, the year of the expedition to China. On that occasion the Emperor seems to have wished to satisfy himself that he had the whole country with him in his new policy, which was, of course, so intimately connected with the naval development on which his heart was set. The result of his action was satisfactory enough; at any rate his Imperial Majesty has never failed to get his ships. There is, however, no evidence of any second consultation of the Foreign Affairs Committee. There was certainly an occasion when the Committee should have been convoked, if the States were to have any influence whatever over Imperial foreign policy. That occasion was in 1905 when, as a result of the Imperial visit to Tangier, events were to all appearance moving in the direction of a war with France. It is reported that the King of Wurtemberg approached certain of his fellow

Sovereigns with a view to some joint remonstrance to the Emperor and a suggestion that the Foreign Committee should be reconstituted into an advisory body with real, though strictly limited, powers. Whether the King's proposal was ever carried into effect or not, certainly nothing came of it, and the foreign policy of the Empire remains independent of any real constitutional control.

It is unfortunate that so little is known about the working of the Federal Council. Quite apart from the fact that it is the most successful Federal body in existence, it is the field on which constitutional struggles must be fought out, and thus far transcends in importance the larger and noisier body, the Reichstag. As the organ of the State Governments, the Council is the natural champion of State rights against Prussian aggression. As the sovereign legislative body it is the only possible opponent of executive encroachment. The story of the development of the battle must, however, be postponed until the remaining portion of the Legislature—the Reichstag—has been dealt with.

II.

The Reichstag consists of three hundred and ninety-seven members elected by direct, secret, and universal suffrage. As a Parliament it is a complete failure, and proves the political incapacity of the German people in their present stage of development. At the time of its establishment there were two political parties in Germany, whose representatives were elected in every State by the possessors of a limited franchise—the Conservatives, aristocratic and absolutist, and the Liberals, intellectual and democratic. The Conservatives were good Germans of the old school; the Liberals swore by the doctrines of Bentham, and were usually English in their sympathies. By birth, education, and temperament Bismarck was a Conservative, and to the end of his days he never understood the idea of Parliamentary Government. But the Conservatives were impossible allies in 1871. As has been said, they were men of the old school—men, that is, of their particular State, unsympathetic towards the idea of Empires and disdainful of universal suffrage. Now, inasmuch as it was Bismarck's policy to make the Empire a real unity and not a mere paper federation, it was clear to him that the Conservatives must be regarded as opponents, at any rate until they had appreciated the meaning of the moving events of the last nine critical years. On the other hand, if Bismarck distrusted the Conservatives, the Liberals distrusted Bismarck. From his accession to power in 1862 he had been a pillar of absolutism. He had quarrelled with the Liberal majority in Prussia, and in defiance of public opinion had dissolved Parliament and pursued his policy undismayed. So serious was the situation in 1863 that the Crown Prince ventured to remind his father that an old man of sixty-six ought not to embark on a line of conduct which might be disastrous to his dynasty. For this Bismarck never forgave him. No one could then foresee that the old man of sixty-six was destined, ere Fate had done with him, to enter France as a conqueror for the second time; to be the

The Political Parties.

central figure of a memorable scene in the splendid gallery of the palace of the Bourbon Kings ; to pass away full of years and honour, amid the sorrow of a loyal people ; and within a hundred days to be followed to the grave by the son who would have reversed his policy twenty-five years before.

It was with this Bismarck, whom the Crown Prince, the hope of German Liberalism, had opposed in 1863, that German Liberals were invited to co-operate eight short years later. The alliance was little to the liking of either party, but it was inevitable. The promotion of German Unity had been the great object of Liberalism since the Napoleonic wars. That unity had been achieved, though by means scarcely in accord with Liberal principles. In view of its achievement Bismarck was prepared to bury the hatchet, and even requested and received an amnesty for his unconstitutional conduct. History has shown that he was right in regarding Liberalism as his best ally. It is the Liberals who have always supported Imperial intrusions into the sphere of State rights, and in accordance with its traditions the Liberal Party has now helped to carry a Law of Public Meeting which, illiberal though in some respects it is, has at least substituted one Imperial enactment for a number of regulations differing in every State of the Empire. But in the early seventies the Liberal Party was not unanimous ; there was an influential minority which held that it was impossible to touch pitch without being defiled, and therefore kept sullenly aloof. The Bismarckian Liberals were regarded as having sacrificed principle for Imperial favour, and public confidence was largely withdrawn from them. But it was not round the dissentients that the people eventually rallied.

On the Conservative side there was a similar cleavage. A far-sighted minority joined Bismarck. They were men after his own heart and were warmly welcomed by him ; nor have they and their successors ceased to be the most constant and most thoroughgoing supporters of the Imperial Government. The two old parties thus became four in the very first Reichstag that ever assembled. The Government majority consisted of a Liberal-Conservative *bloc*—a form of majority destined to be revived more than once in after years. The Liberal section of the majority insisted on their price. If the autocrat was to be whitewashed he must make some concession to Liberal principles. There appear to have been hopes that the Chancellor, in the fulness of his repentance, would give some countenance to the doctrine of the responsibility of Ministers. As a matter of fact, the Chancellor would have torn up his Constitution before doing anything of the sort. There was, however, another Liberal doctrine—the doctrine of religious freedom—with which he was prepared to trifle. With calm cynicism he permitted the Liberals to raise the cry of freedom of conscience, while at the same time he pointed out to the Conservatives, all of them good Lutherans, that what was really involved was nothing more than an attack on the Roman Catholics. The ruse succeeded, and the whole *bloc* supported the Government in what soon came to be known as the *Kultur-Kampf*.

The result was to bring into premature existence a party which was bound to arise sooner or later. What happened was this : Bismarck appointed Dr. Falk as his Minister of Education. Left to his own devices this Minister began to legislate in a spirit of pure Erastianism. In its new-born zeal for the spiritual welfare of the people the State enacted, among other things, that no person should be appointed to a cure of souls who had not given proof of his powers in some place of education under State control, and therefore undenominational. The effect of this measure was to recall the memories of the Thirty Years War. That long and embittered struggle had left the German people in a state of torpor from which only the shock of Jena, a century and a half afterwards, could rouse them. Worse than its paralysing influence was the fact that it had proved indecisive. It would have been far better for Germany had victory rested with either the Reformation or the counter-Reformation, had the issue been disposed of once and for all and become a memory, leaving no smouldering embers of religious hatred. Both parties, however, maintained their ground, and in consequence there is a fair balance between Roman Catholic and Protestant in the Germany of to-day. The heart of the Empire is Lutheran ; the out-lying provinces remain loyal to the old faith. Aix-la-Chapelle, Strasburg, Munich, Breslau, and Posen are centres of Roman Catholicism. Only from Holland is it possible to enter Germany without coming upon a predominantly Roman Catholic population. The religious division is also political. Protestantism has naval ambitions, for it is strong along the whole length of the Imperial seaboard, whereas it is only towards the Russian frontier that Roman Catholicism touches the coast. Protestantism, too, is bellicose ; it is not on it that the first brunt of invasion will fall. Finally, Protestantism is intensely and almost aggressively Prussian.

The leadership of the opposition to Prussianisation would thus inevitably gravitate to Roman Catholic hands. Dr. Falk's legislation was enough to create a Roman Catholic Party. The new organisation was, and has always remained, a real party and not a faction. It appealed to every corner of Germany in which a Roman Catholic voter was to be found, though its main strength lay in the south and east. It embraced all grades of society—Polish and Silesian nobles, middle-class retailers and merchants in every Roman Catholic province, peasants in Bavaria and the Rhine valley, artisans in Westphalia, Silesia, and Alsace-Lorraine. It was wealthy, united, admirably led, and full of vigour. It boasted its Imperialism—a boast it has since justified—but it refused to be false to its traditions. Including as it did both Liberals and Conservatives it occupied a central position in the Reichstag, from which fact it takes its name. Becoming almost at once the strongest and most stable party in the State it met the new legislation with the most determined opposition. Persecution only strengthened its position, and by 1878 more than one thousand parishes were without a priest, anti-Prussian feeling was on the increase, and there was talk of appealing for Austrian aid. The last danger was

particularly patent to Bismarck, whose mind was always possessed by a dread of hostile combinations. He met it characteristically by concluding an alliance with the Austrian Monarchy. But he had already determined to throw over the Liberals and their policy with them. It is proof of the absence of any feeling for Parliamentary government in Germany that the Chancellor did not resign. He changed his programme and continued in office.

There was another cause which moved Bismarck to a change of tactics. There was no doubt that German Liberalism was a decaying force. It had not been popular in its origin; it was an intellectual movement, bound to decline as soon as the masses had been made articulate by the grant of universal suffrage. A programme of practical Radicalism as an alternative attraction was inconceivable in a country where popular government had never existed. What was offered to the working classes, and accepted by them, was a new theory—and that theory was Socialism. Now to Bismarck Socialism was necessarily anathema. He was utterly destitute of democratic sympathies, and it was to the democracy that Socialism addressed itself. Moreover, as a result of constant and untiring energy he had at last turned the dream of a united Germany into a reality, and here was Socialism preaching Revolution. Bismarck was not the man to sit still while his work was being undone. He proclaimed that the Empire was in danger, and demanded drastic legislation. The Liberals exasperated him by refusing to put shackles on individual freedom. An accident gave the Chancellor his opportunity. In 1878 two attempts were made on the life of the Emperor, and in the second he was wounded. In the resulting panic Bismarck got his way; but his breach with Liberalism was already complete.

{III.

The decay of
the Reichstag.
Group System
at work.

Before the Empire was ten years old the process of Parliamentary disintegration was already fairly advanced. There were five parties in the Chamber—the Pro-Bismarckian and the Anti-Bismarckian Conservatives, the Pro-Bismarckian and the Anti-Bismarckian Liberals, and the Roman Catholic Centre. But for repressive legislation there would have been a sixth—the Social Democrats; and, indeed, some Socialists had managed to get elected. So disunited a body was unlikely to assert Parliamentary sovereignty, and an incident had already occurred which revealed its impotence. The military authorities felt that continuity of administration was hampered by an annual vote for men. They demanded that the establishment should be fixed for a period of seven years. The Chamber protested that it would not, and could not, give a vote which must inevitably weaken the authority of its successor, and from time to time the protest has been renewed. But it has always been overcome; though by way of concession the period of seven years has been reduced to five.

In 1878, however, an event occurred which was to shatter, apparently for ever, all dreams of Parliamentary government. The existing Tariff had been framed mainly in accordance with

orthodox principles. Bismarck had not, however, acted in any way out of deference to the professors. His business had been to exclude Austria from Germany, and he had accordingly established a Tariff in which that highly Protectionist Empire could not participate. By 1871 his object had been achieved, and there was nothing to prevent a reconsideration of the whole question and the establishment of a new Tariff with a different object. During the previous thirty years the Protectionist writings of Friedrich List had been steadily gaining ground, and at last Bismarck proclaimed himself converted. The Liberals were horrified and the Conservatives delighted, but both the horror of the one and the delight of the other were premature. Bismarck was no Protectionist of the old school. His Conservative supporters were landowners to whom Protection meant simply the exclusion of foreign cereals and foreign cattle. Bismarck, on the contrary, was clear that, although Prussia might not be a Western Power, the German Empire was, and accordingly he set himself to further the development of German industry, and he was not without allies. A number of members of the Liberal Party who were also business men approved of Protection for the infant industries of the Empire. The resulting Tariff was a compromise between the two views; it provided both for duties on food and for duties on goods. Neither side was fully satisfied, but both sides had partially attained their object.

The German Tariff has never lost the character imposed upon it in 1878. Periodically revised, it has always been carried by a composite majority of manufacturers and agrarians; and the only party it really suits is the Centre, which contains both these elements. Each successive Tariff is only regarded as a temporary measure; for the fiscal struggle has produced a new line of political cleavage in Germany. On the one side is the Right, whose stronghold is the East, desirous of protection for agriculture, but angry at the high price of goods, especially of agricultural machinery, and suffering under the high price of money and the migration of its best labour which industrial development has brought about. On the other side is the Left, whose stronghold is the West, desirous that the home market should be secured to its supporters, but protesting that the high rate of wages, consequent on the high price of food, is a most serious obstacle toward successful competition with foreign States in neutral markets. This cleavage between Agrarians and Industrialists is as real, and seems likely to be as permanent as the cleavage between Protestants and Roman Catholics. There are thus two simultaneous lines of party division in Germany, a fact which makes Parliamentary government impossible. For Parliamentary government presumes a responsible Opposition, and a responsible Opposition can never exist in a State where there must inevitably be three parties, a Right, Centre, and a Left. The result has been to concentrate all real power in the hands of the Executive, which relies on a composite majority differing, if need be, with each successive Bill. On the other hand, the parties have crumbled away under the corroding influence of the Tariff question. Not one is sufficiently powerful to carry its own policy

through as a whole. Consequently each has broken up into quite a number of groups representative of isolated and particular interests. When the Tariff comes up for reconsideration each group is ready to make a bargain with the Executive; and even the Social Democrats can be trusted to counterbalance Conservative opposition to a reduction of duties on food. It is at such moments as this that the Centre has its opportunity. Representing, as it does, every class in the State, it necessarily supports a Tariff which makes some effort to uphold a balance between all classes. It is thus a trustworthy and consistent supporter of the Executive, and the Tariff of 1905 could never have been carried without its aid. Now that it has done its work it has been thrown aside with characteristic violence; but the present Tariff will not endure for ever, and the next revision will give the Centre a chance of reasserting its influence.

We left the Social Democracy crippled but not crushed by the repressive legislation of 1878. The franchise of the working classes having been reduced to a farce, Bismarck assumed the role of a benevolent despot, and carried through a scheme of old age pensions, together with other social reforms. Meanwhile the leaders of the Socialist movement settled down to their work in London and Geneva, and, despite the vigilance of the police, quantities of leaflets and newspapers were smuggled into Germany. In 1890 the restrictive laws expired, and his defeat on the question of their renewal was the final though not the formal cause of Bismarck's retirement. Autocratic as ever, Bismarck submitted to his Imperial master proposals which would apparently have led to the disfranchisement of a large section of the population. To his lasting credit the Emperor refused to sanction them. He was, he said, a young and untried man, and he was resolved not to begin his reign with an act of tyranny. The Chancellor gave way, and the Workman's Law of 1890 is a comparatively mild enactment, under which Social Democracy has flourished and expanded. No such result, however, was intended or even foreseen. There is no doubt that the young Emperor was sincerely desirous of enlisting the masses in the work of government. Socialist, of course, he was not. But he was prepared to consider, and probably to support, any reasoned and moderate practical scheme of social reform put forward by the representatives of the proletariat. The Socialists had a glorious opportunity, of which they signally failed to take advantage. They refused to budge one inch from their attitude of irreconcilable opposition to the existing system. They would not modify what they intended to overthrow. Even in the Socialist ranks the wisdom of this step was much questioned both at the time and subsequently. At the present moment ground is being won by the Revisionists, who hold that Socialism should assert itself, promote useful though no doubt insufficient legislation, and make itself a real force in the State, abandoning its present position of theoretic dignity and practical sulkiness. The Revisionists may win a complete victory, but they are not likely to get another chance during the present reign. It was the Emperor himself who

offered peace, and his offer was rejected with scorn. His Imperial Majesty is not the man to forgive a snub. His denunciations of the Socialists have been continuous and uncompromising, and he has repeatedly asserted that Socialism and Patriotism are utterly incompatible.

During the present century there has been some improvement in the state of the Reichstag. The credit for this is due to the Centre, undoubtedly the best influence in German politics. Claiming, as it does, to represent not a class but a people it has met with natural approval from the Emperor, whose own ideal is to be the head of a nation and not of a clique. In Opposition it does not disintegrate; on the contrary, it is even stronger than when in office, for it has the support of the Deputies from Alsace-Lorraine, who are naturally reluctant to record a vote in favour of a Government they detest. Such an Opposition has a cohesive influence over the groups composing the majority, which consist at the moment of a *bloc* of Liberals and Conservatives. Its solidarity remains very doubtful, but it contains the elements of a national party, backed chiefly by the middle-class electors and comprising both agriculturists and merchants. The Chancellor has made efforts, up to the present not wholly successful, to deal with his majority as a party—not as a fusion of groups. This has especially been the case with his Naval and Colonial policy. There are many who fear that Prince Bülow has undertaken an impossible task; but all who are anxious that German policy shall be the consistent and indubitable expression of the wishes of the German nation as a whole, not of the interests which happen to predominate at the moment, will watch the new experiment with deep interest and with earnest wishes for its success.

IV.

The Executive of the German Empire as recognised by the Constitution consists of two persons, and of two only—the Emperor and the Imperial Chancellor. The Chancellor is appointed by the Emperor, can be dismissed by him, and is responsible to him. He is President of the Federal Council, and it is convenient that, as chief Prussian delegate, he should also be chief Prussian Minister. All the other Imperial Ministers are subordinate to the Chancellor. Technically they are merely superintendents of the various departments of the Imperial Chancellery. They may, indeed, be endowed with plenary powers, as was the Foreign Secretary, Herr von Schön, at the time of the Imperial visit last autumn; but the right of conferring such powers is vested in the Chancellor, not in the Emperor. Inasmuch as one of the Emperor's main functions is to represent Germany in her dealings with foreign States it is desirable that the Chancellor should not be ignorant of diplomacy. Accordingly, of the four Chancellors of the Empire three have held Ambassadorial posts. The one exception, Caprivi, was a soldier, but his period of office was neither successful nor prolonged. It is clear that the relations between the Emperor and his only Minister must be peculiarly intimate; and that it must be hard to determine

The Executive,
Emperor and
Chancellor.

the exact origin of any particular policy. Certainly the present Emperor felt himself unable to exert his proper influence while Bismarck was in office ; and it is usually assumed in this country that Prince Bülow is simply the mild-mannered mouthpiece of his Imperial master. That is an exaggeration. One of the chief duties of a Chancellor is to manage the Reichstag ; if he fails to do so he must either resign, as Prince Hohenlohe did, or fight the people, as Bismarck was ready to do. The Emperor consequently is not expected to identify himself with any particular piece of Parliamentary tactics. Still, that is what the present Emperor has been induced to do.

The quarrel with the Centre was primarily Prince Bülow's quarrel ; he had no right to expect active backing from the highest quarter. Nevertheless, at the last election the Prince was permitted to put the Imperial arms on his election posters, so to speak, and his success was greeted with open Imperial approbation. The Emperor thus showed the most signal loyalty to his Minister ; a fact which will make his position extremely difficult if the *bloc* breaks down and the Prince has to resign. On the other hand, it would also be an exaggeration to say, as a German once said to the writer, that the Chancellor has the Emperor in his pocket, adding that the only European monarch who is capable of conceiving and accomplishing a policy entirely his own is the King of England—a view, by the way, which is not seldom expressed in Germany. As a matter of fact Prince Bülow and the Emperor work together with remarkable harmony ; but it is probably correct to say that while in domestic policy the initiative is usually due to the Chancellor in foreign politics it is due to his master.

The constitutional position of the Emperor is every whit as anomalous as that of the Roman Cæsars whose title he bears. By the arrangements of the North German Confederation the Prussian King was given a position exceptional in three respects. In the first place the presidency of the Confederation was perpetually vested in Prussia. In the second place the Prussian King was made Commander-in-Chief of the Federal Armies in time of war. In the third place the Prussian Navy was transferred to the Confederation, while its command remained as before in the hands of King William. The possession of these special attributes offers a temptation to the King of Prussia as such to assert some form of superiority over his fellow Sovereigns, thus destroying the Federal character of the Union. Accordingly it was decided in 1871 to elevate these attributes into a separate office. The title finally selected as that least likely to wound particularist feelings was "German Emperor"—a title which was always to be borne by the King of Prussia. To the Constitutional lawyer, then, the Imperial style is simply an appanage of the Prussian Crown. As such it was always regarded by the first Emperor, who remained at heart and in conduct King of Prussia to the last. Indeed, as we know from his letters to his wife, he only accepted the new title with reluctance and even with sorrow. William II., on the other hand, is every inch an Emperor. In certain circles, both in

this country and in his own, it is fashionable to speak of him as an autocrat. That is a misnomer; technically the Emperor is not even a Sovereign. Autocracy suggests the possession of irresponsible or unlimited powers; sovereignty rests with the fountain of authority in a State. Now the German Emperor was invited to assume his title by the King of Bavaria in the name of the Princes of Germany, who selected it as appropriate to the possessor of the powers conferred by treaty on the King of Prussia. These powers are clearly defined in the Constitution of the Empire. There is in consequence no such thing as an Imperial prerogative in Germany, any more than there is a presidential prerogative in the United States. Both Emperor and President derive their authority from the same source—a Constitution based on treaties. That authority is, of course, very great, but it is not autocratic. From the point of view of theory autocratic is, in fact, precisely what the Imperial position is not, and what it cannot possibly become without changing its character and its basis.

As chief of the presiding State and as commander of the armed forces of the Empire, the Emperor is necessarily head of the Executive—executive authority including, as it does in this country, the right of making treaties. In legislation the Constitution gives him no voice whatever. His assent is not required and his business is confined to engrossing for publication every law which has been passed by the Chamber and sanctioned by the Council. As King of Prussia, of course, he can carry or veto any proposal, but his power in that capacity is of a very different order. There are many territorial Sovereigns; there is but one Emperor. The King of Prussia is simply *primus inter pares*; the German Emperor stands alone, possessed of powers different in kind from those wielded by anyone else in Germany. The relations of the Emperor to the Legislature are thus those of a President rather than of a monarch. But he is a President with monarchial attributes. Apart from the fact that the Imperial title is confined to the head for the time being of a particular Royal House, the Emperor is Commander-in-Chief of the Navy and of the Army in time of war. The distinction between his military and his naval powers is the cause of many of the most important developments of Germany's policy in recent years. The Navy is an Imperial Navy; the Army is a Federal Army. There is not a single Imperial regiment, not a single Imperial officer. The one Imperial thing about the Army is the Emperor himself, who is possessed in time of war of real authority, though in peace his functions are restricted to duties analogous to those of our Inspector-General. It is not even correct to speak of the German Army. There are four Armies in Germany, those of Prussia, Bavaria, Saxony, and Wurtemberg. The smaller States have transferred their military organisations to Prussia, and the three independent States have entered into pledges with regard to establishment, etc. The recruit takes a joint oath of loyalty to his territorial Sovereign and to the Emperor. Bavaria, however, always jealous of her independence, does not administer the oath of fidelity to the Emperor until war actually breaks out. It is

clear that except in his military capacity the Emperor has no direct connection with the people of Germany at all, and it would be a good thing if those excellent persons who rail out against William II. for being a War-lord would kindly suggest what else he could possibly be without lowering the title of Emperor to an empty form.

That is exactly his Imperial Majesty's difficulty. The title of Emperor carries no weight with the Germans; they have been quite familiar with it for over a thousand years, and have come to expect it. But an Emperor who is not a figurehead, an Empire that really means something—these are novelties, unexpected and somewhat disconcerting. It would be impossible for a man like William II. to refrain from doing his utmost to bring the conception of Empire home to the German people. German unity has been hovering before their eyes since 1813; it has now been achieved, but it has not yet been made indissoluble, except on paper. There is no man in Europe with a stronger sense of duty than the German Emperor, and his duty, as he conceives it, with perfect correctness, is to be an Emperor, and being an Emperor means being a War-lord. In regard to Army matters, his Majesty can only be a real Emperor in time of war. He does his best in peace time, but it is in the Naval Department that he gets his chance, for the Navy is Imperial both in fact and in name.

In the British Empire there are two truly Imperial institutions. One is the Crown, the other is the Judicial Committee of the Privy Council. In Germany there is also a Supreme Court of Appeal for the whole Empire. It meets at Leipsic, not in Berlin, and this and the fact that it contains no less than ninety-two judges are the only interesting things about it. On the other hand, the Imperial Crown—which is, of course, the Crown of Charlemagne—is “yet to seek.” It remains in Vienna, the last relic of the Western greatness of the House of Hapsburg. To make up for it there is the Navy. At the time of the achievement of German unity a Federal Navy was as impossible as a Federal Army was inevitable. It was impossible because there were no navies to federate. Of the leading States only Prussia possessed a seaboard, and accordingly only Prussia could boast of even the rudiments of a naval force. This Prussian Navy, originally transferred to the Confederation, became the Imperial Navy in 1870. As it then chiefly existed on paper its importance was not realised. The present Emperor, however, with his usual keenness of vision, saw that here was his opportunity. It has been said that the Emperor is a President with monarchical attributes. The increase of Imperial power, or, in other words, the assertion of executive independence of the Legislature, is best attained by adding to those attributes. This is exactly what William II. has done. The German Navy is under the direct command of the German Emperor. Neither the King of Prussia nor anybody else has any concern therewith. The Navy is, in fact, the embodiment of Empire, the manifestation of the Imperial authority, and incidentally the reminder that, the whole being stronger than its parts, the foreign politics of the Empire have a wider range than had the foreign politics of any of its constituent elements.

In so far as this last point implies that the German Empire can and does take up an attitude of rivalry towards the British Empire which the Kingdom of Prussia would never have assumed there is some ground for the current suggestion that the German Navy is aimed at ourselves. But Great Britain is not the fundamental object of Germany's naval development. What the German Navy really aims at is the German people. No foreign policy is ever dictated by the course of external affairs only. It must have, and it is intended to have, an immediate influence at home. Now, this is particularly the case with the German Navy. The danger was that the work of cementing the German Empire might be made impossible by the cry of Prussianisation, and that in consequence the German Empire would be a mere geographical expression. William II. has evaded that danger. The German Navy may, and probably does, strengthen the hands of the Executive to a dangerous extent, but it cannot by any stretch of imagination be described as a piece of Prussian aggression. The Emperor has, in fact, taught his people to think Imperially, and if Imperial thought materialises, as it has very naturally done, in a battle fleet, that is no reason for asserting with the alarmists that it is only an acute form of Anglophobia.

PART II.

PROVISIONS OF UNION CONSTITUTIONS.

CHAPTER I

THE GOVERNOR-GENERAL.

The British North America Act, 1867, does not make any provision for the appointment of the Governor-General of Canada, as the Australian Constitution does for that of the Governor-General of Australia. In the case of Canada, the executive government and authority of and over Canada is declared to continue and be vested in the Queen (sec. 9); and in the next section the Governor-General is referred to as "carrying on the government of Canada on behalf and in the name of the Queen."

Appointment :
Canada. It is necessary, therefore, to inquire briefly into the manner in which the Queen's authority over Canada is delegated to the Governor-General, since it is clear that, under the Canadian Constitution, his authority to act as the representative of the Queen depends upon the terms of his appointment. The question is complicated by certain changes which have been made in the method of appointing the Governor-General of Canada as compared with that of appointing the Governors of other Colonies. Since the year 1875 it has been the practice of the Imperial Government to appoint Colonial Governors by an instrument embodied in three documents:—The Letters Patent; the Commission; and the Instructions. The Letters Patent define the duties of the office; the Commission refers to the terms of the Letters Patent and contains the formal Act of appointment, whilst the Instructions detail more fully the powers and functions of the office, especially with regard to the appointment of and dealings with the Executive Council; the rules for assenting to, dissenting from, or reserving for the Queen's pleasure proposed Colonial legislation; and the right to pardon or reprove offenders. The change made in 1875 did not affect the Instructions, which remained practically the same as those which had been given to Colonial Governors for about forty years before that date. On the appointment of Lord Lorne as Governor-General of Canada in 1878, these Instructions were

substantially altered, as a result of representations which had been made by the Dominion Government. The most notable changes made were the omission of those Instructions which had enjoined the Governor to omit to consult his Executive Council in cases where consultation would materially prejudice the Queen's service or upon matters too trivial or too urgent to admit of consultation ; to act in opposition to the advice of the Executive Council upon grounds or reasons which he was to report to the Colonial Secretary ; to give or withhold his consent to Bills passed by the Colonial Legislature upon certain specific grounds ; and to reserve for the Queen's assent Bills dealing with certain specified subjects. These Instructions were omitted from the Canadian Instructions of 1878 ; and, as to the exercise of the right of pardon, whereas the old Instructions definitely ordered the Governor "to decide either to extend or to withhold a pardon or a reprieve, according to your own deliberate judgment, whether the members of our said Executive Council concur therein or otherwise," the Canadian Instructions of 1878 made the following provision as to the exercise of the right of pardon or reprieve :—

"And we do hereby direct and enjoin that our said Governor-General shall not pardon or reprieve any such offender without first receiving, in capital cases, the advice of the Privy Council of our said Dominion, and, in other cases, the advice of at least one of his Ministers."

The general effect of this amendment of the Instructions was to make the position of the Governor-General consistent with the existence of responsible government. As issued to Lord Lorne in 1878 and to his successors in the office, the Instructions to the Governor-General of Canada are confined to the proper publication of his Commission and taking of the necessary oath on entering upon the duties of his office ; the administration of the oath to persons holding positions of trust in the Dominion ; the communication of his Instructions to the Privy Council of the Dominion ; the transmission to the Imperial Government of copies "of all laws assented to by him in the Queen's name, or reserved for signification of the Royal pleasure" ; the exercise of the right of pardon and reprieve after taking the advice of the Privy Council or a Minister (*vide* above) ; and the prohibition to quit the Dominion without leave of absence. [It may be mentioned in passing that the old Instructions were still issued to other Colonial Governors till the year 1892, when new Instructions, on the model of those given to the Governor-General of Canada, were drafted as a result of a vigorous remonstrance by Chief Justice Higinbotham of Victoria, who had pointed out the inconsistency between the commands laid upon Governors by many of the old Instructions and their powers under responsible government.]

With regard to the exercise of the power of pardon by the Governor-General of Canada, it should be noted that, though the advice of the Privy Council is necessary in capital cases, the Governor-General is not bound to follow that advice. The matter is one of prerogative—depending in the ultimate result upon the exercise of his individual discretion as the representative of the

Power of
Pardon.

Queen. This is well expressed in the following extract from a despatch sent by the Colonial Secretary to Lord Dufferin when Governor-General of Canada :—

“ Advice having thus been given to the Governor, he has to decide for himself how he will act. . . . It has, I am aware, been argued that Ministers cannot undertake to be responsible for the administration of affairs unless their advice is necessarily to prevail on all questions, including those connected with the Prerogative of Pardon. But I am led to believe that this view does not meet with general acceptance, and there is at all events one good reason why it should not. The pressure, political as well as social, which would be brought to bear upon the Ministers if the decisions of such questions rested practically with them, would be most embarrassing to them, while the ultimate consequence might be a serious interference with the sentences of the Courts.”

This argument applies also to the Governor-General of Australia, and will explain why the prerogative of pardon is not mentioned in the Constitutions either of Canada or Australia. There is one other point of interest in this connection. The 44th resolution adopted by the Conference of Quebec in 1864 was as follows :—

“ The power of respiting, reprieving and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant-Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by the General Parliament.”

This resolution was objected to by the Imperial Government when the British North American Act was under consideration, and was, with the consent of the Canadian delegates, set aside and expunged.

Executive
Powers :
Canada.

As to the executive powers and functions of the Governor-General of Canada, they are defined by the British North America Act as vested in, and to be carried out by him in some cases with the advice of the Privy Council of the Dominion and in other cases without that advice. In practice [as will be shown later in discussing the executive powers and duties of the Governor-General of Australia] the distinction is of little importance, since all executive actions of a Governor are taken by him on the responsibility of Ministers, who have to answer to Parliament for such actions, whether that responsibility is or is not expressly laid by the Constitution upon the shoulders of the Ministry. Sec. 12 of the British North America Act defines generally the “ powers, authorities and functions ” of the Governor-General of Canada as being those which “ under any act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually.” They are to be exercised by him “ with the advice, or with the advice and consent of, or in conjunction with, the Queen’s Privy Council for

Canada, or any members thereof, or by the Governor-General individually, as the case requires; subject, nevertheless [except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland], to be abolished or altered by the Parliament of Canada."

This section applies not only to the *executive* powers and functions of the Governor-General of Canada, but also to what may be termed his *legislative* powers as the representative of the Sovereign. To confine ourselves for the present to his *executive* powers and functions, various sections of the British North America Act, 1867, assign to him certain specific powers and functions—some of which are to be exercised [as has been pointed out above] by "the Governor-General in Council," whilst others are to be exercised simply "by the Governor-General." In summarising the executive powers and functions of the Governor-General of Canada, it is convenient to adopt that distinction.

(1) *Executive Powers and Functions of Governor-General in Council*.—To appoint a Lieutenant-Governor for each Province [Sec. 58]. To remove a Lieutenant-Governor, under certain specified conditions [Sec. 59]. To administer the oath to Lieutenant-Governors [Sec. 60]. To appoint such officers as he deems necessary for the effectual execution of the Constitution, "until the Parliament of Canada otherwise provides" [Sec. 131]. "Until the Parliament of Canada otherwise provides," to order the time and form of payments to be made under the Constitution, "or in discharge of liabilities created under any Act of the Provinces of Canada, Nova Scotia and New Brunswick," and assumed by the Dominion at its creation [Sec. 120]. To order that "such and so many of the records, books and documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec" [Sec. 143].

(2) *Executive Powers and Functions of Governor-General [not in Council]*.—To choose and remove members of the Privy Council of Canada [Sec. 11]. To summon qualified persons to be Senators [Sec. 24]. On the direction of the Queen, to add to the Senate three or six qualified persons, representing equally the three divisions of Canada [Sec. 26]. To fill vacancies in the Senate [Sec. 32]. To appoint and remove the Speaker of the Senate [Sec. 34]. To summon the House of Commons [Sec. 38]. To cause writs to be issued for the election of members of the House of Commons [Sec. 42]. To dissolve the House of Commons [Sec. 50]. To recommend to Parliament appropriation and taxation Bills [Sec. 54]. To appoint the Judges of the Superior, District and County Courts in each Province [Sec. 96]. To remove Judges of the Superior Courts, on an address from the Dominion Parliament [Sec. 99].

Further, Sec. 14 of the British North America Act makes it awful for the Queen, "if Her Majesty thinks fit, to authorise the Governor-General from time to time to appoint any person or any persons, jointly or severally, to be his deputy or deputies within

any part or parts of Canada, and in that capacity to exercise, during the pleasure of the Governor-General, such of the powers, authorities and functions of the Governor-General as the Governor-General deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen; but the appointment of such a deputy or deputies shall not affect the exercise by the Governor-General himself of any power, authority or function."

Appointment :
Australia.

Under Sec. 3 of the "Commonwealth of Australia Constitution Act" "the Queen may at any time after the Proclamation [uniting the separate States of Australia in a Federal Commonwealth] appoint a Governor-General for the Commonwealth." Under Sec. 2 of the Constitution introduced by that Act he is appointed as the representative of the Sovereign in the Commonwealth, holding office at the Sovereign's pleasure, and exercising, subject to the Constitution, such powers and functions of the Sovereign as the Sovereign may assign him. Though he holds office at the pleasure of the Sovereign, Todd [Parliamentary Government in the British Colonies, 2nd Ed., pp. 122-123] points out that since 1828 it has been understood that after the expiration of six years a Colonial Governor retires from his government as a matter of course, though he may be reappointed for a further term. As to his powers and functions, Messrs. Quick and Garran emphasise the distinction, already alluded to, between those which are conferred upon him as the representative of the Sovereign and are parts of the Royal Prerogative; and those which have become detached from the Prerogative and are therefore declared to be vested in the "Governor in Council." The distinction is, however, as they say, really a matter of words, since even in the exercise of the powers comprised under the first head, the Governor-General is bound, in accordance with well-established Constitutional practice, to act only with the advice of some Minister responsible to the Federal Parliament. Further, both classes of powers are *executive* powers.

Executive
Powers :
Australia.

As to these executive powers, conferred on the Governor-General of Australia either as the representative of the Sovereign or when acting with the advice of the Executive Council, Messrs. Quick and Garran provide* the following summary:—

"*Statutory Powers of the Governor-General (not in Council).*—To appoint times for holding Sessions of Parliament; to prorogue Parliament; to dissolve House of Representatives [Sec. 5]. To notify, to the Governor of a State interested, the happening of a vacancy in the Senate [Sec. 21]. To recommend to Parliament the appropriation of revenue or money [Sec. 56]. To dissolve the Senate and House of Representatives simultaneously; and to convene a joint sitting of members of both Houses [Sec. 57]. To exercise, as representative of the Sovereign, the executive power of the Commonwealth [Sec. 61]. To choose, summon and dismiss members of the Federal Executive Council [Sec. 62]. To appoint [and dismiss] officers to administer Departments of State [Sec. 64]. To direct, in the absence of Parliamentary provision, what offices shall be held by Ministers of State [Sec. 65]. As the representative of the Sovereign, to be Commander-in-Chief of the naval and military forces [Sec. 68]. To proclaim dates when certain departments

* Ann. Const. Aust. Comm., pp. 404 and 405.

shall be transferred to the Commonwealth [Sec. 69]. And generally to exercise all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony 'in respect of matters which under this Constitution pass to the Executive Government of the Commonwealth' [Sec. 70].

"Statutory Powers of the Governor-General in Council.—To issue writs for General Elections of the House of Representatives [Sec. 32]. To issue writs for election to vacancies in the House of Representatives [Sec. 33]. To establish Departments of State [Sec. 64]. To appoint and remove [the latter on addresses from both Houses] all officers except Ministers of State [Sec. 67]. To appoint the Justices of the High Court and other Federal Courts [Sec. 72]. To draw money from the Federal Treasury and expend it until the first meeting of Parliament [Sec. 83]. To appoint members of the Inter-State Commission and, upon addresses from both Houses, to remove them [Sec. 103]. And generally, to exercise 'in respect of matters which under this Constitution pass to the Executive Government of the Commonwealth' all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony with the advice of the Executive Council [Sec. 70]."

The executive powers of the Governor-Generals of Canada and Australia, detailed above, should be distinguished from what may be called their legislative powers. Sec. 58 of the Australian Constitution provides that :—

"Legislative "
Powers: Canada
and Australia.

"When a proposed law passed by both Houses of Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure."

This section is copied from Sec. 55 of the British North America Act of 1867, but omits the provision of that section to the effect that the Governor-General's decision shall be subject, not only to the provisions of the Constitution, but "to Her Majesty's Instructions." It was the insertion of this provision in the Canadian Constitution which led to the revision in 1878 of the Instructions issued to the Governor-General of Canada. It has been pointed out, at the beginning of this chapter that one of the changes in the Instructions was the omission of the clause defining a number of classes of Bills to which the Governor-General was to refuse his assent. In practice it has been the custom in Canada for a formal report on all doubtful legislation to be submitted to the Governor-General by the Minister of Justice. But the point is that as to the exercise of this legislative power of assenting to Bills passed by the Central Parliament, the Governor-General is free to exercise his own discretion ; whereas in the exercise of his executive powers he is bound by Constitutional practice to act according to the advice either of his Ministers or his Executive Council, as the case may be. This is made clear, as far as the duty of the Governor-General of Canada in dealing with legislation by the Dominion Parliament is concerned, by Todd [Parliamentary Government in Colonies, 2nd Ed., pp. 166, 167]* In Australia the rule is the same. Thus :—*

* "Annotated Constitution of Australian Commonwealth." p 691

"In determining the exercise of his discretion, the Governor-General will be entitled to receive from the Law Officers of the Commonwealth a report in reference to each Bill to be submitted for his sanction, specifying whether there is any legal objection to his assenting to it, or whether his duty and obligations, as Representative of the Crown, necessitate that he should withhold his assent or reserve the Bill for the consideration of the Imperial Government. As a general rule, a Governor would be justified in accepting and acting upon the statements of such functionaries in local matters. But if his own individual judgment does not coincide with their interpretation of the law, his responsibility to the Crown may require him to delay acting on the advice of his Ministers. But whatever steps he may think fit to take upon such a grave emergency, and from whatever materials his opinion may be formed, he is individually responsible for his conduct, and cannot shelter himself behind advice obtained from outside his Ministry."

[In the case of the Governor-General of Canada, his position in relation to legislation passed by the Dominion Parliament should be contrasted with his position in relation to legislation passed by the Provincial Parliaments. The latter is fully discussed below.]

Both the Constitution of Canada [Sec. 57] and that of Australia [Sec. 60] provide a period for the signification of the Queen's assent to Bills reserved by the Governor-General. Such a Bill does not pass into law unless "within two years from the day on which it was presented to the Governor-General for the Queen's assent, the Governor-General signifies, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the assent of the Queen in Council." Similarly, both the Canadian and Australian Constitutions [Sec. 56 and Sec. 59 respectively] give the Queen in Council power to disallow any Bill assented to by the Governor-General. In Canada this may be done within two years after the receipt of the Bill by the Secretary of State, in Australia within one year from the Governor-General's assent. The Constitution of Australia also [Sec. 58] allows the Governor-General to "return to the House in which it originated any proposed law" presented to him for the Queen's assent, and to "transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation."

Provincial
Legislation in
Canada.

The Governor-General of Canada is also vested with special powers and placed in a position of special importance in so far as the giving or withholding of assent to legislation passed by the Provincial Parliaments is concerned. In this respect the Constitution of Canada is unique, and its provisions are of singular interest on that account. The necessity of assigning special functions to the Governor-General of Canada in this respect arises from the fact that, at the creation of the Dominion, the whole body of legislative power was taken away from the several States and given to the Dominion Parliament, whilst the Parliaments of the States—which were known as Provinces after the Dominion Constitution had come into force—were given certain strictly-limited and defined powers of legislation. [*Vide* chapter on "Legislative Power of Central Government."] In complete contrast to this method of distribution of the legislative power, Sec. 106 of the Australian Constitution says that :—

"The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

And Sec. 107 says that :—

"Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

On the other hand, Sec. 90 of the British North America Act provides that :—

"The following provisions of this Act respecting the Parliament of Canada, namely: the provisions relating to appropriation and tax bills,* the recommendation of money votes, the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved—shall extend and apply to the Legislatures of the several Provinces, as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, of one year for two years, and of the Province for Canada."

The provisions referred to in this section—as far as the duties of the Governor-General in relation to Bills passed by the Dominion Parliament are concerned—are those contained in Secs. 55, 56, and 57 of the British North America Act. They are fully described above. The effect of Sec. 90 is to place the Governor-General in the same position with regard to assenting to, reserving, or disallowing Bills passed by the Provincial Legislatures, as that which the Queen-in-Council holds with regard to Bills passed by the Dominion Parliament. That is to say that when a Bill is passed by a Provincial Legislature, the Lieutenant-Governor of the Province either assents or withholds his assent to it, or reserves it for the signification of the pleasure of the Governor-General.

As to the practical exercise by the Governor-General of Canada of this power of supervision over Bills passed by the Provincial Legislatures, the following memorandum sent to the Privy Council of Canada by the Minister of Justice [Sir John A. Macdonald] in 1868 is of interest. [The recommendations of this memorandum have—with one or two exceptions—been acted upon.]

"The same powers of disallowance as have always belonged to the Imperial Government with respect to the Acts passed by Colonial Legislatures have been conferred by the Union Act (*i.e.*, the B.N.A. Act, 1867) on the Government of Canada. Of late years Her Majesty's Government has not, as a general rule, interfered with the legislation of the Colonies having representative institutions and responsible government, except in the cases specially mentioned in the instruction to the Governors, or in matters of Imperial and not merely local interest.

"Under the present Constitution of Canada, the Governor-General will be called upon to consider the propriety of allowance or disallowance of provincial Acts much more frequently than Her Majesty's Government has been with respect to Colonial enactments. In deciding whether any Act of a Provincial Legislature should be disallowed or sanctioned, the Governor-General must not only consider whether it affects the interests of the whole Dominion or not, but also whether it be unconstitutional—whether it

* See Chapter V., p. 108.

exceeds the jurisdiction conferred on the local Legislatures—and in cases where the jurisdiction is concurrent, whether it clashes with the legislation of the General Parliament.

"As it is of importance that the course of local legislation should be interfered with as little as possible, and the power of disallowance exercised with great caution, and only in cases where the law and the general interests of the Dominion imperatively demand it, the undersigned recommends that the following course be pursued :

"That on receipt by Your Excellency of the Acts passed in any Province, they be referred to the Minister of Justice for report, and that he, with all convenient speed, do report as to those Acts which he considers free from objection of any kind, and if such report be approved by Your Excellency in Council, that such approval be forthwith communicated to the Provincial Government.

"That he make a separate report, or reports, on those Acts which he may consider—

"(1) As being altogether illegal or unconstitutional ;

"(2) As illegal or unconstitutional in part ;

"(3) In cases of concurrent jurisdiction, as clashing with the legislation of the General Parliament ;

"(4) As affecting the interests of the Dominion generally.

"And that in such report, or reports, he give his reasons for his opinions.

"That where a measure is considered only partially defective, or where objectionable as being prejudicial to the general interests of the Dominion, or as clashing with its legislation, communication should be had with the Provincial Government with respect to such measure, and that, in such cases, the Act should not be disallowed, if the general interests permit such a course, until the local Government has an opportunity of considering and discussing the objections taken, and the local Legislatures have also had an opportunity of remedying the defects found to exist."*

There remains the question whether the Governor-General of Canada can exercise this power with regard to Provincial Legislation on his own individual discretion, or whether he must act according to the advice of his Ministers. On this point, the conclusions arrived at by a Minister of Justice for the Dominion—[Edward Blake]—as expressed in a memorandum dated 22nd December, 1875—are worthy of quotation :—

"The power of disallowance of Canadian Statutes is, by Sec. 56 of the British North America Act, 1867, vested in the Queen in Council. By Sec. 90 of the same Act this provision is extended and applied to each Province as if it were re-enacted, and is so made applicable in terms thereto, with the substitution, amongst other things, of the Governor-General for the Queen. The result is that by the express words of the Act, the power of disallowance of Provincial Statutes is vested in the Governor-General in Council, a phrase which, under the 13th section of the Act, means the Governor-General acting by and with the advice of the Queen's Privy Council of Canada. . . . It results from the preceding observations that the only contingencies which can arise are : (1) That the Governor should propose to disallow a Provincial Statute without or against the advice of his Ministers ; (2) that Ministers should propose to disallow a Provincial Statute without the assent of the Governor. The position taken by the Council is that neither of these things can be done ; that, the power being vested in the Governor-General in Council, any action taken must be accomplished by Order in Council, and that a Governor-General who thinks it necessary that a Provincial Act should be disallowed must find Ministers who will take the responsibility of advising its disallowance ; while Ministers who think it necessary that a Provincial Act should be disallowed must resign unless they can secure the consent of the Governor-General to its disallowance, Ministers being in every case responsible to Parliament for the course taken."†

* Quoted in Wheeler's "Confederation Law of Canada" p. 51.

† Quoted in Wheeler's "Confederation Law of Canada," p. 337.

Both the Canadian and Australian Constitutions provide for the ^{Salary.} payment of an annual salary to the Governor-General. Thus Sec. ^{Canada.} 105 of the British North America Act enacts :—

“ Unless altered by the Parliament of Canada, the salary of the Governor-General shall be ten thousand pounds sterling of money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada. . . . ”

This power of alteration was actually exercised by the Dominion Parliament, which passed an Act, on 22nd May, 1868, reducing the salary of the Governor-General to £6,500 ; but the Act, having been reserved for the consideration of the Queen, was disallowed—for reasons which were defined by the Secretary of State in the following words :—

“ Whilst it is with reluctance, and only on serious occasions, that the Queen’s Government can advise Her Majesty to withhold the Royal sanction from a Bill which has passed the two branches of the Canadian Parliament, yet a regard for the interests of Canada, and a well-founded apprehension that a reduction in the salary of the Governor-General would place the office, as far as salary is a standard of recognition, in the third class among Colonial Governments, obliged Her Majesty’s Government to advise that this Bill should not be permitted to become law.”*

Sec. 3 of the Australian Constitution provides for the payment ^{Australia.} to the Governor-General, “ until the Parliament otherwise provides,” of an annual salary of £10,000. The salary of a Governor-General is not to be altered during his continuance in office. By Sec. 4, the provisions of the Constitution relating to the Governor-General are applied to the Governor-General for the time being, or any person appointed by the Sovereign to administer the Government of the Commonwealth ; “ but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth.”

* Quoted by Doutre : “ Constitution of Canada,” p. 350

CHAPTER II.

FORM OF THE LEGISLATURE.

[This chapter is quoted from "A manual of reference to authorities for the use of the members of the National Australasian Convention which will assemble at Sydney on March 2nd, 1891," by Richard C. Baker, one of the delegates of South Australia at that Convention.]

There can be little doubt but that there must be two Houses of Parliament (which for convenience may for the present be called the Senate and the House of Representatives).

*All experience, both ancient and modern, clearly proves this, and in all cases where it has been attempted to carry on a democratic form of government with one House, the result has been either anarchy and the abandonment of the attempt, or the institution of some other form of government.†

Three of the States of America (Pennsylvania, Georgia and Vermont) tried the uni-cameral, or one House system, but all gave it up.

Kent remarks: ‡"The instability and passion which marked their proceedings (Legislatures of Pennsylvania and Georgia) was very visible at the time, and the subject of much public animadversion; and in the subsequent reform of their Constitution the people were so sensible of this defect, and of the inconvenience they had suffered from it, that in both States a Senate was introduced." §With these trifling exceptions (Pennsylvania, etc.), the bi-cameral system is the "*quod semper, quod ubique, quod ab omnibus*" of American constitutional doctrine.

It is true that three of the Canadian Provinces (Ontario, British Columbia and Manitoba) and most of the Swiss Cantons have adopted the uni-cameral system, but the powers of the Legislatures of the Provinces in Canada are so restricted, and such large powers are (in theory) given to the Federal Government to veto their acts, that it was thought the functions of a second Chamber could be exercised by the Dominion Government; and in Switzerland the "referendum," to a certain extent, exercises such functions.

‡ * Sparta, Carthage, Rome, England, Sweden, Norway, United States, British North America, Germany, Italy, Austria, Spain, and South American Republics all have had or have two or more Houses. The Parliament of Sweden consisted of four Chambers, and the States General of France of three.

† See cases cited by Kent, 231, 232. ‡ Kent, 230. § Bryce, 461

In the first American Constitution (the Confederation) there was only one Chamber, each State being allowed to send any number of delegates (not less than two or more than seven), the delegates jointly having only one vote ; this was considered* one of its most prominent defects, and was one of the chief reasons which led to the Philadelphia Convention, and the Constitution there framed.

†A somewhat similar state of things existed in Switzerland up to 1848, but it did not work satisfactorily, and by the Constitution framed in that year a bi-cameral legislature was adopted.

There is an evident growing impatience in these Colonies over the salutary checks provided by Upper Chambers, a desire to, as it is termed, "make them more amenable to public opinion," but ‡"as the cool and deliberate sense of the community ought in all Governments, and actually will in all free Governments, prevail over the views of its rulers, so there are particular moments in public affairs when the people, stimulated by some irregular passion or some illicit advantage, or led by the artful misrepresentations of unprincipled men, may call for measures which they themselves will be afterwards most ready to lament and condemn. In this critical moment how salutary will be the interference of some temperate and respectable body of citizens in order to check the misguided career and to suspend the blow meditated by the people against themselves until reason, justice, and truth can regain their authority over the public mind."

All the reasons and arguments in favour of the bi-cameral system in "Unitarian" Governments hold with increased force and effect when applied to Federal Governments. The problem is then further complicated by the necessity of securing the smaller States from the usurpation or tyranny of the larger, whilst at the same time giving due weight and power to the population and wealth of the larger States. This can only be done by two Houses, in which the one (the Senate) represents the States, each State being represented by the same number of representatives, and the other (the House of Representatives) represents the people in States according to their numbers.

The American Constitution framed on this system has been in existence for over 100 years, and no conflict has ever arisen between the two branches of the Legislature (although they are jealous and combative and frequently come into collision), founded on the difference of their Constitutions.§ The House of Representatives has never become the organ of large States nor prone to act in their interests, so neither has the Senate been the stronghold of the small States. The United States became a Federation in respect of the Senate, a nation in respect of the House of Representatives, and so it has remained, the Constitution providing that ||"no State can be deprived of its equal suffrage in the Senate without its consent," and, notwithstanding the fact that the

* Story, 49.

† Adams, 20.

‡ Federalist LXIII., 476.

§ Bryce, 182.

|| Article, 5.

population of some States has increased most enormously, whilst that of others has remained comparatively stationary, and that many contests in other matters have arisen between the different States, and between individual States and the Federation, no contest has arisen between the great States and the small ones as such.* Another advantage is that this system strongly differentiates the members of the Senate from the members of the House of Representatives by the mode of their choice and character of their representation.

* The population of New York in 1880 was 5,082,871, of Rhode Island 276,531, they both send two representatives to the Senate. Some of the Western States have still smaller populations. Montana was admitted as a State when its population was 39,157, but that was because it was considered certain to rapidly increase.

CHAPTER III.

COMPOSITION OF THE UPPER HOUSE.

* "In the United States the Constitution provides that 'the Senate of the United States shall be composed of two (2) Senators from each State chosen by the Legislature thereof,' and that 'the times, places, and manner of holding elections for Senators shall be prescribed in each State by the Legislature thereof, but that Congress may at any time by law make or alter such regulations except as to the place of choosing Senators.' United States.

"Concerning these two clauses, Kent remarks: 'The election of the Senate by the States Legislatures is also a recognition of their (the States) separate and independent existence, and renders them absolutely essential to the operation of the National Government. There were difficulties some years ago as to the true construction of the Constitution in the choice of Senators. They were to be chosen by the States Legislatures, and the Legislatures were to prescribe the times, places, and manner for holding elections for Senators, and Congress was authorised to make and alter such regulations, except as to place. As the Legislature may prescribe the manner, it has been considered and settled in New York that the Legislature may prescribe that they shall be chosen by joint vote or ballot of the two Houses, in case the two Houses cannot separately concur in a choice, and then the weight of the Senate is lost and dissipated in the more numerous vote of the Assembly. This construction has become too convenient, and has been too long settled by the recognition of Senators so elected to be now disturbed, though I should think, if the question were a new one, that when the Constitution directed that the Senators should be chosen by the Legislature, it meant not the members of the Legislature *per capita*, but the Legislature in the true technical sense, being the two Houses acting in their separate and organised capacities with the ordinary Constitutional right of negation on each other's proceedings. This was a contemporary exposition of the clause in question, and was particularly mentioned in the well-known letters of the Federal Farmer, who surveyed the Constitution with a jealous and scrutinising eye.'"

The term of office of Senators of the United States is six years¹ but this is limited by an intermediate change in the personality of the Senate as a body. This results from the provisions of Sub-Sec. (2), Sec. 3, Article I of the Constitution which enacts that :—

"Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year."

No person can be a Senator unless he is thirty years old, has been nine years a citizen of the United States, and is, when elected, an inhabitant of the State which chooses him.

* R. C. Baker : "Manual for use of Convention of 1891," p. 65.

"The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day. [Sub-sec. (2), Section 4, Article I., Constitution of United States.]"

Switzerland.

"The Upper House of the Swiss Federal Assembly [known as the Council of the States] is composed of 44 deputies. Each Canton is equally represented and returns two members. . . . In the three cases where Cantons have been split into two, each half Canton returns but one member. . . . The mode of election of the deputies is determined absolutely by each Canton. In most cases they are chosen by the legislative bodies, but in some by the people. The functions of the majority of these deputies last for a year . . . others are chosen for three years like the deputies of the National Council, but the duration of their functions is left entirely in the hands of each Canton. . . . The deputies are paid by their Cantons, except when they form part of Committees during a recess, and then they receive an allowance out of the Federal chest."*

Canada.

The composition of the Canadian Upper House is governed by Secs. 21-36 and 147 of the British North America Act. Sec. 21 fixes the number of members at 72, but this is modified by Sec. 147 in case Newfoundland shall become a part of the Dominion.† The Act divides Canada into three divisions, Ontario, Quebec and the Maritime Provinces—*i.e.*, Nova Scotia and New Brunswick. Each of these divisions is represented by 24 Senators. But additional Senators have been added with the adhesion to the Dominion of the Provinces of British Columbia, Manitoba, Prince Edward Island and the North-West Territories, and the total number of Senators is now 87.‡ The qualifications of a Senator are that he shall be 30 years of age; a natural-born or naturalised subject of the Crown; possessed of freehold within the Province which he represents to the value of 4,000 dollars over and above all charges and encumbrances, and of personal property to the value of 4,000 dollars over and above his debts and liabilities; resident in the Province he represents. If that Province is Quebec he must have his real property qualification in the *electoral division* for which he is appointed or be resident within that division. The Governor-General nominates the members of the Senate, who hold office for life, but may resign by writing addressed to the Governor-General. They also vacate their office if they fail to attend Parliament for two consecutive sessions; if they take an oath or make a declaration of adherence to, or do any act constituting them the subjects of a foreign power; if they are adjudged bankrupt or become public defaulters or apply for the benefit of any law relating to insolvent debtors; if they are attainted for treason or

* Adams: "The Swiss Confederation," p. 43.

† And *vide* also Part II, Chap. XVII., "Admission of New States."

‡ *Vide* Part II, Chap. XVI., "The States."

convicted of felony or any infamous crime ; and if they cease to be qualified in respect of property or residence. The Governor-General may fill vacancies by nomination, and an attendance of fifteen, including the Speaker (who is appointed and may be removed by the Governor-General), constitutes a quorum. A majority of voices decides ; the Speaker has a vote in all cases, and, when the voting is equal, has a casting vote.

In Australia, the Senate of the Commonwealth is composed of six Australia. Senators for each State which was an original member of the Commonwealth and this number—as far as such original States are concerned—cannot be diminished, nor can the equality of senatorial representation be affected. Subject to this, Parliament can make laws increasing or diminishing the number of Senators. The members of the Senate are to be “ directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.” [Sec. 7 of the Constitution]. [A special provision is made by this section as to the method of election of the Senators representing Queensland.]

Messrs. Quick and Garran* emphasize very clearly the importance of direct election of Senators. They point out that in the draft Bill of 1891 the United States precedent was followed, and it was provided that the Senators of each State should be elected by the Houses of Parliament of that State ; but that in the Convention which drafted the Constitution only a small minority were in favour of this method of election, while not a single member supported a nominated Senate on the Canadian lines.

Sec. 7 also provides that Senators shall be elected for a term of six years, their names being certified by the Governor of each State to the Governor-General. This is modified by Sec. 13, which enacts that “ as soon as may be after the Senate first meets, and after each meeting of the Senate following a dissolution thereof, the Senate shall divide the Senators chosen for each State into two classes as nearly equal in numbers as practicable ; and the places of the Senators of the first-class shall become vacant at the expiration of the third year, and the places of those of the second-class at the expiration of the sixth year, from the beginning of their term of service ; and afterwards the places of Senators shall become vacant at the expiration of six years from the beginning of their term of service.” [The “ dissolution ” referred to in this section is that provided for by Sec. 57, which is fully dealt with in chapter V.] The qualifications of a Senator are the same as those of a member of the House of Representatives. [*Vide* Chapter IV, “ Composition of Lower House.”] (Sec. 16.)

The qualification of electors of Senators are the same as those prescribed by the Constitution or by Parliament [acting in accordance with its power under the Constitution to alter the Federal franchise] as the qualification of electors of members of the House of Representatives. “ But in the choosing of Senators each elector

*Ann. Const. Aust. Comm., p. 418.

shall vote only once." (Sec. 8.) The provision as to voting only once is necessary to prevent an elector from voting in all the electoral divisions of any State in which he might be registered and to which he could travel on the polling day. The Commonwealth Parliament is given power to prescribe the method of choosing Senators, "but so that the method shall be uniform in all the States." Subject to this, the Parliament of each State has power to prescribe the method of choosing Senators for that State. The State Parliaments have also absolute power of making laws for determining the times and places of election of Senators for the State. [Sec. 9.] The words "method of choosing" in this section are explained by Messrs. Quick and Garran* as including the mode in which an elector can record his vote (*e.g.*, "plumping" or single voting) and general regulations as to the conduct of elections. Sec. 10 of the Constitution also enacts that "until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of Senators for the State."

Other sections provide for the election of a Senator to be President of the Senate and for his resignation or removal; for resignation of Senators; for their ceasing to be Senators upon absence for two consecutive months without permission; for the filling of vacancies, and for a quorum of at least one-third of the total number of Senators. Sec. 23 enacts that a majority of votes shall decide, that each Senator shall have one vote and that the President shall have a vote in each case in addition to a casting vote.

* Ann. Const. Aust. Comm., p. 426.

CHAPTER IV.

COMPOSITION OF THE LOWER HOUSE.

I. Number of Members.—Mr. R. C. Baker's summary of the Constitutions of Switzerland, the United States and Canada in so far as they relate to the number of Members of the Lower House is as follows :—

“The Constitution of the House of Representatives is one of the very few points concerning which the three modern Federal Republics—America, Canada, and Switzerland—essentially concur. In each case it is established on a population basis, readjusted by a census every ten years, the population—not of the whole Federation, but of each separate Province—being the basis of representation.

“(1) In Switzerland, each 20,000 citizens in any one Canton are entitled to elect one member to the National Council. Fractions over 10,000 are considered as 20,000. No Canton is to have less than one member. Thus, prior to the last census, Nilderswald, with a population of 12,558, elected one member; Berne, with a population of 536,182, elected 27 members. The members are elected for three years. In 1889 there were 145 members. Switzerland.

“(2) In Canada it was provided that the House of Commons should consist of 131 members apportioned as therein provided, and that a decennial readjustment should take place on the basis that Quebec was to always have 65 members, and each other Province was to be entitled to such a number of members as should bear the same proportion to the number of its population as the number 65 would bear to the number of the population of Quebec. The members are elected for five years; there were in 1889 215 members. Canada.

“In working out this sum any fraction over one-half of the number of electors entitled to return a member is to be considered as equal to a whole.

“(3) In America the Constitution states that :—

“‘Representatives shall be apportioned amongst the States according to their respective numbers.’ The United States.

“‘The number of representatives shall not exceed one for every 30,000, but each State shall have at least one representative.’ In 1787 there was one representative for every 30,000, in 1880 one for every 154,325 of the population; total number of representatives in 1880, 330.

“The wording of the American Constitution has given rise to a great deal of trouble; it was soon found impossible to work out the problem set. If any given number of electors were decreed by Congress entitled to a representative, there was always a fraction, sometimes small, sometimes great, left over in each State, so that in fact there has never been any representation in each State apportioned in exact proportion to its numbers as the Constitution requires.* The Canadian plan has avoided the difficulty into which the American has fallen and lays down a rule by which the numbers of the House of Representatives cannot become unwieldy, which is not only self-acting, but which is also capable of being accurately applied.”

* Story, 61.

Australia.

The Constitution of the Australian Commonwealth follows the precedent of that of the United States in making the number of members of the House of Representatives proportionate to the population of each State, but it also provides a definitive method of working out the calculation. By Sec. 24 the number of members of the Lower House [who are "directly chosen by the people of the Commonwealth"] is to be "as nearly as practicable twice the number of the Senators." The method by which the number of Federal Representatives of each State is to be determined is as follows :—

- (i.) "A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of Senators.
- (ii.) "The number of members to be chosen in each State shall be determined by dividing the number of people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State."

And "notwithstanding anything in this section, five members at least shall be chosen in each Original State."

The two elements of importance in this method of fixing the number of Representatives are, first, the provision that that number must be as nearly as possible twice the number of Senators, and, secondly, the method of working out the calculation based on the quota. The first of these is not subject to the discretion of the Federal Parliament. It is part of the Constitution and can only be altered by an amendment of the Constitution. Taken together, they make the number of Representatives depend on the number of Senators and thus "prevent an automatic or arbitrary increase in the number of members of the House of Representatives by which there would be a continually growing disparity between the number of members of that House and the Senate; and give some security for maintaining the numerical strength as well as the Constitutional power of the Senate."* As to the first, it may be pointed out that there are only two ways of increasing the number of Senators under the Constitution, *i.e.* (1), an act of the Federal Parliament increasing the number of Senators for each original State; and (2) an Act of the Federal Parliament admitting or establishing a new State or States, and thus introducing additional Senators. As to the second, Messrs. Quick and Garran† give a useful illustration of the method of arriving at the quota :—

The Australian
Quota.

"The quota is that number of the aggregate population of the Commonwealth which, considered as a unit, is entitled to one member in the House of Representatives. It is obtained by dividing the population of the Commonwealth by twice the number of Senators. The population is that shown in the latest statistics. The number resulting from the division, the quotient, is called the quota. This is the ratio of representation, there being one representative for every quota of the population of the Commonwealth. The method of obtaining the quota may be shown as follows :

* "Annotated Constitution of Australian Commonwealth," p. 452.

† "Annotated Constitution of Australian Commonwealth," p. 454.

Twice the number of Senators.	Population of Commonwealth.	Quota.
72	3,717,700	51,635 (or exactly, $\frac{1}{51,634.72}$)

“ It seems clear that strict accuracy requires that the quota should be calculated out to an exact decimal fraction. To neglect the fraction might, in occasional instances, make the difference of a representative more or less. Thus, suppose that the exact quota were 50,000.4, and that the population of one of the States were 1,025,001. If the quota were taken at its integral value—50,000—the State would be entitled to 21 representatives—20 in respect of 1,000,000 inhabitants and one more in respect of the remainder of 25,001, which is greater than one-half of the quota. But if the quota is taken at its exact value, the remainder will only be 24,993, or less than one half of the quota, and the State will only be entitled to 20 representatives.”

For purposes of the first Parliament, the number of Representatives was fixed by Sec. 26 of the Constitution, the number being based on the figures returned by a Conference of Statisticians held on 21st February, 1900. This was necessary because it was nine years since the last census of Australia had been taken. Subject to the Constitution, the Federal Parliament may make laws for increasing or diminishing the number of Representatives. (Sec. 27.)

II. *Qualification of Electors.*—Sec. 30 of the Australian Constitution enacts that “ *until Parliament otherwise provides*, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the laws of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each State shall vote only once.” Australia.

The corresponding section of the American Constitution provides United States. that “ the qualifications of the electors shall be the same, from time to time, as those of the electors in the several States of the most numerous branch of their own Legislatures”—thus giving the separate States power to fix the Federal franchise without any submission of that power to a subsequent enactment of the Federal Parliament. This unlimited power of the States Governments was abused, and is now subject to the provisions of the XIVth and XVth amendments. The XIVth amendment lays down the right of every male citizen of full age to vote for Federal purposes, and provides that if any State abridges that right “ [except for participation in rebellion or other crime] the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in that State.” The XVth amendment defends the right of citizens of full age against abridgment “ on account of race, colour, or previous condition of servitude,” and gives Congress the power to enforce this by appropriate legislation.

Canada.

As to Canada, Sec. 41 of the British North America Act says that :—

“Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces of the Union relative to the following matters or any of them, namely,—the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the several Provinces, the voters at elections of such members, the oaths to be taken by voters, the returning officers, their powers and duties, the proceedings at elections, the periods during which elections may be continued, the trial of controverted elections and proceedings incident thereto, the vacating of seats of members and the execution of new writs in case of seats vacated otherwise than by dissolution—shall respectively apply to elections of members to serve in the House of Commons for the same several Provinces.”

In Canada, therefore, the old law of the separate States was allowed to continue after the Union, but its duration was specially limited to the period during which the Parliament of Canada was willing for it to continue. This limitation is repeated in the Constitution of Australia, which also allows the laws in force in each State relating to elections for the more numerous House of the State Parliament to apply to elections in the State for the Federal House of Representatives (Sec. 31.). The Australian Constitution, however, differs from that of Canada on two further points. By Sec. 29 it allows each State to make its own laws (until the Parliament otherwise provides) “for determining the divisions in that State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division ; and it provides (Sec. 41) that “no adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any Law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.”

Switzerland.

In an election for the Lower House of the Swiss Federal Assembly—known as the National Council—“every Swiss, not otherwise disqualified, is entitled on attaining his twenty-first year to as many votes as there are members for his electoral district. . . . The National Council is elected by ballot for three years, and is renewed integrally on the last October Sunday of the triennial period. It is only in case of a revision of the Constitution that an extraordinary integral renewal of the two Chambers can take place. There are registers in each Commune in which every citizen having a vote must be inscribed. These registers are on view at least two weeks before the day of the election, and are closed, at the earliest, three days previous to it.

“The process of voting is entirely in the hands of the Cantons and differs considerably. In one Canton a card from the Commune where each voter is registered is left at his house ; in another he has to present himself at the proper office in order to obtain his card, and so on. The place of voting is very often a church.

“Candidates must be elected by an absolute majority—*i.e.*, half the voters *plus* one at least at the first ballot, and similarly if a second ballot is required. If a third ballot becomes necessary the election is decided in favour of the candidate or candidates, as the case may be, at the top of the poll.”*

III. Qualification of Members.—In the United States the qualification for a Representative is that he is 25 years of age, has been seven years a citizen of the United States and is when elected an inhabitant of the State in which he is chosen. In Switzerland “every lay Swiss citizen who has the right to vote, except an ecclesiastic, is eligible for membership in the National Council.” In Canada the qualification is fixed by Sec. 41 of the British North America Act (quoted above). The Australian Constitution provides (Sec. 34) that “until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows :—

- “(i.) He must be of the full age of 21 years and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen.
- “(ii.) He must be a subject of the Queen, either natural-born or for at least five years naturalised under a law of the United Kingdom or of a Colony which has become or becomes a State, or of the Commonwealth or of a State.”

Other sections of the Australian Constitution provide for the continuance of every House of Representatives for three years from the first meeting of the House [the Canadian rule is five years from the day of the return of the writs for choosing the House]; for its dissolution at any time by the Governor-General [Sec. 28]; for the election of a Speaker who must be a member of the House [Sec. 35]; for resignation of members and for their ceasing to be members upon absence without permission for two consecutive months; for a quorum consisting of one-third of the total number of members and for the determination of any question by a majority of votes. The Speaker has no ordinary vote, but has a casting vote.

* Adams : “The Swiss Confederation,” p. 40.

CHAPTER V.

BOTH HOUSES OF THE CENTRAL LEGISLATURE.

Canada.

I. Powers, Privileges and Immunities.—The British North America Act, 1867, contained a provision [Sec. 18] to safeguard the powers, privileges and immunities of the Dominion Parliament, as follows :—

“ The privileges, immunities and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that *the same shall never exceed those at the passing of this Act* held enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.”

This section was amended in 1875 by an Act of the Imperial Parliament. The words “ *the same shall never exceed those at the passing of this* ” were omitted, and in their place the words “ *any Act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such* ” were inserted.

Australia.

The corresponding clause of the Australian Commonwealth Act is Sec. 49, which reads as follows :—

“ The powers, privileges and immunities of the Senate and of the House of Representatives, and of the Members and Committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its Members and Committees, at the establishment of the Commonwealth.”

It will be seen that there is a considerable difference between the powers of the Canadian and the Australian Parliaments as to declaring their powers, privileges and immunities. The Canadian Parliament is only given the power of declaration subject to the limitation that the declaratory Act shall not confer powers, etc., exceeding those of the English House of Commons. In the Australian Commonwealth Act, this limitation only applies to the period prior to the passing of a declaratory Act by the Commonwealth Parliament ; and, upon the passing of such an Act, the limitation no longer applies.

Messrs. Quick and Garran summarise [Annotated Constitution, Australian Commonwealth, p. 503], the effect of the leading decisions by the Privy Council upon the privileges of Colonial Legislatures :—

“ The law and custom of Parliament is not a part of the Common Law which Englishmen are presumed to have carried with them, as their political birthright and heritage, when they founded new settlements and colonies beyond the seas. The inherent powers and privileges of Colonial legislative

bodies, *which have no express grant of powers and privileges similar to those of the British Parliament*, have been considered and expounded by the highest legal authorities of the Empire in a number of leading cases. The principles affirmed were :—(1) That a Colonial legislative body is not entitled to enjoy and exercise the powers, privileges and immunities of the Houses of the British Parliament, unless [they] have been expressly conferred upon such a body by Imperial Statute ; (2) that such Legislative Assemblies can, without express grant, exercise all regulating and self-preserving powers that are necessary for their existence, and for the proper exercise of the functions they are intended to execute. Whatever, in a reasonable sense, is necessary for these purposes is impliedly granted, whenever any such legislative body is established by competent authority. . . . For these purposes, protective and self-defensive authority only, and not punitive, is necessary. . . .”

But when there is an express grant to a Colonial Legislature of the right to declare its powers, privileges and immunities as equal to those of the British House of Commons, the case is different. Thus the Constitution of Victoria contained a similar clause to the original Sec. 18 of the British North America Act. Under this clause the Legislature of Victoria passed a declaratory Act. The Privy Council held, in the case of “*The Speaker of the Legislative Assembly of Victoria vs. Glass*,” that “the privileges and powers of the Imperial House of Commons at the time of the passing of the Constitutional Act were carried over to the Legislative Assembly of the Colony, including the privilege of judging what is contempt and the power of committing for contempt by a warrant stating generally that a contempt had taken place, without setting forth the specific grounds of such commitment.”*

As to what are the powers, privileges and immunities of the British House of Commons, the following quotation from the “Annotated Constitution of the Australian Commonwealth” [pp. 501, 502] affords an admirable summary of their main features :—

“*Powers and Privileges.*—The following are among the principal powers and privileges of each House, and of the members of each House, of the Imperial Parliament, as now known to the law :—

- “(i.) The power to order the attendance at the bar of the House of persons whose conduct has been brought before the House on a matter of privilege
- “(ii.) To order the arrest and imprisonment of persons guilty of contempt and breach of privilege.
- “(iii.) To arrest for breach of privilege by warrant of the Speaker.
- “(iv.) To issue such a warrant for arrest and imprisonment for contempt and breach of privilege, without showing any particular grounds or causes thereof.
- “(v.) To regulate its proceedings by standing rules and orders having the force of law.
- “(vi.) To suspend disorderly members.
- “(vii.) To expel members guilty of disgraceful and infamous conduct.
- “(viii.) The right of free speech in Parliament, without liability to action or impeachment for anything spoken therein ; established by the 9th Article of the Bill of Rights.
- “(ix.) The right of each House, as a body, to freedom of access to the Sovereign for the purpose of presenting and defending its views.

* Quoted by Doutre : “Constitution of Canada,” p. 72.

Breaches of Privileges.—The following are instances :

- “(i.) Wilful disobedience to the standing rules and orders of the House passed in the exercise of its Constitutional functions.
- “(ii.) Wilful disobedience to particular orders of the House, made in the exercise of its Constitutional functions.
- “(iii.) Wilfully obstructing the business of the House.
- “(iv.) Insults, reflections, indignities and libels on the character, conduct and proceedings of the House and of its members.
- “(v.) Assaults on members of the House.
- “(vi.) Interference with the Officers of the House in the discharge of their duties.

Immunities.—The following are instances :

- “(i.) Immunity of members for anything said by them in the course of Parliamentary debates.
- “(ii.) Immunity of members from arrest and imprisonment for civil causes whilst attending Parliament, and for forty days after every prorogation, and for forty days from the next appointed meeting.
- “(iii.) Immunity of members from the obligation to serve on juries.
- “(iv.) Immunity of witnesses, summoned to attend either House of Parliament, from arrest for civil causes.
- “(v.) Immunity of Parliamentary witnesses from being questioned or impeached for evidence given before either House.
- “(vi.) Immunity of Officers of either House, in immediate attendance and service of the House, from arrest for civil causes.”

United States.

II. Money Bills.—The right of originating, amending or rejecting money bills has been the prime ground of conflict between the two Houses of the Legislature, not only in England, but wherever the features of the British Constitution have been copied in framing the Constitutions of other countries. Thus the Constitution of the United States [Article I., Sec. 7, Sub-Sec. (i.)] provides that :—

“All Bills for raising revenue shall originate in the House of Representatives ; but the Senate may propose or concur with amendments, as on other Bills.”

Story in his “Commentaries on the Constitution of the United States” [Secs. 873 to 881] points out that this clause in the Constitution “is, beyond all question, borrowed from the British House of Commons, of which it is the ancient and indisputable privilege and right, that all grants of subsidies and Parliamentary aids shall begin in their House, and are first bestowed by them, although their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the Legislature [*i.e.*, the Lords and the Sovereign]. . . . The true reason seems to be this. The Lords being a permanent hereditary body, created at pleasure by the King, are supposed more liable to be influenced by the Crown, and when once influenced more likely to continue so than the Commons, who are a temporary elective body, freely nominated by the people. It would, therefore, be extremely dangerous to give the Lords any power of framing new taxes for the subject. It is sufficient that they have the power of rejecting, if they think the Commons too lavish or improvident in their grants. . . .

"So jealous are the Commons of this valuable privilege, that herein they will not suffer the other House to exert any power but that of rejecting. They will not permit the least alteration or amendment to be made by the Lords to the mode of taxing the people by a money bill; and under this appellation are included all bills, by which money is directed to be raised upon the subject for any purpose, or in any shape whatsoever, either for the exigencies of the Government, and collected from the Kingdom in general, as the land tax; or for private benefit, and collected in any particular district, as turnpikes, parish-rates and the like. It is obvious that this power might be capable of great abuse if other bills were tacked to such money bills; and accordingly it was found that money-bills were sometimes tacked to favourite measures of the Commons, with a view to ensure their passage by the Lords. This extraordinary use, or rather perversion, of the power would, if suffered to grow into a common practice, have completely destroyed the equilibrium of the British Constitution, and subjected both the Lords and the King to the power of the Commons. Resistance was made from time to time to this unconstitutional encroachment; and at length the Lords, with a view to give permanent effect to their own rights, have made it a standing order to reject upon sight all bills that are tacked to money bills. Thus the privilege is maintained on one side, and guarded against undue abuse on the other."*

Story goes on to compare the United States Constitution on this point with the British practice. He justifies the grant to the Senate of the power to amend money bills on the ground that "as the Senators are in a just sense equally representatives of the people, and do not hold their offices by a permanent or hereditary title, but periodically return to the common mass of citizens; and, above all, as direct taxes are, and must be, apportioned among the States according to their Federal population; and as all the States have a distinct local interest, both as to the amount and nature of all taxes of every sort, which are to be levied, there seems a peculiar fitness in giving to the Senate a power to alter and amend, as well as to concur with or reject, all money bills. The due influence of all the States is thus preserved; for otherwise it might happen, from the overwhelming representation of some of the larger States, that taxes might be levied which would bear with peculiar severity upon the interests, either agricultural, commercial or manufacturing, of others, being the minor States; and thus the equilibrium intended by the Constitution, as well of power, as of interest and influence, might be practically subverted."†

As additional arguments in favour of the grant of the amending power to the Senate of the United States, Story adduces the inconvenience of compelling the Senate to reject a money bill "although an amendment of a single line might make it entirely acceptable to both Houses"; the fact that the exclusion of the

* Story: Comm. on Const. of U.S., sections 874, 875.

† Story: Comm., section 876.

amending power of the Upper House in the Constitutions of Virginia and South Carolina [alone of the American Colonies] had been a constant source of difficulties and contentions in those States; and the passage of the clause through the discussions preceding Federation without any serious opposition.

"What Bills"—(he continues)—"are properly 'Bills for raising revenue,' in the sense of the Constitution, has been matter of some discussion. A learned commentator supposes that every Bill which indirectly or consequentially may raise revenue, is, within the sense of the Constitution, a money bill. He therefore thinks that the bills for establishing the Post Office and the Mint, and regulating the value of foreign coin, belong to this class and ought not to have originated (as in fact they did) in the Senate. But the practical construction of the Constitution has been against his opinion. And, indeed, the history of the origin of the power—already suggested—abundantly proves that it has been confined to Bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. No one supposes that a Bill to sell any of the public lands, or to sell public stock, is a Bill to raise revenue in the sense of the Constitution. Much less would a Bill be so deemed which merely regulated the value of foreign or domestic coins, or authorised a discharge of insolvent debtors upon assignment of their estates to the United States, giving a priority of payment to the United States in case of insolvency; although all of them might incidentally bring revenue into the Treasury."*

Canada.

The Canadian Constitution says nothing of the power of the Upper House either to amend or reject money bills. The authors of the Constitution doubtless considered that the Senate of Canada, being a body whose members are nominated by the Crown for life, was in an equivalent position to that of the House of Lords in Great Britain, and that the British practice would, *ipso facto*, apply to the Dominion of Canada in this respect.

The relative clauses of the British North America Act, 1867, are Secs. 53 and 54. They are as follows:—

53. "Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons."
54. "It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address or bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose that has not been first recommended to that House by message of the Governor-General in the session in which such vote, resolution, address or bill is proposed."†

As to what bills are included in the terms of Sec. 53, the following summary of decisions is given by Doutre, "Constitution of Canada," pp. 94-96:—

* Story: Comm., section 880.

† It is interesting to note the difference between the form of Sec. 54 of the British North America Act and the corresponding section [56] of the Australian Constitution. The latter is referred to in detail below. An interesting sketch of the evolution of the Australian Clause during the discussions preceding Federation is given in the "Annotated Constitution of the Australian Commonwealth," p. 680.

“(i.) *On the 7th May, 1868, it was decided by Speaker Cockburn :—*

“That the standing order of the House of Commons, England, declaring :
‘That this House will receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund, or out of the moneys to be provided by Parliament, unless recommended from the Crown,’ should be held in force in the House of Commons, Canada.” [No. 155 Speaker’s Decisions, H. of Comm. of Canada.]

“(ii.) *On the 19th April, 1869, it was decided by Speaker Cockburn :—*

“That a petition for the construction of a public work concluding with the prayer, ‘That Your Honourable House will take such measures as will cause the obstructions to the navigation of the Ottawa river to be removed,’ is a petition asking simply for legislation, and is not a petition asking for money.” [No. 157, Speaker’s Decisions, H. of Comm. of Canada.]

“(iii.) *On the 10th April, 1871, it was decided by Speaker Cockburn :—*

“That a claim for damages against the Government may be referred to a Select Committee ; but if their report should recommend the payment of money, it cannot be concurred in by the House, unless upon the recommendation of the Governor-General.” [No. 189, Speaker’s Decisions, H. of Comm. of Canada.]

“(iv.) *On the 26th February, 1875, it was decided by the Speaker :—*

“That an amendment to change the destination of a grant of money recommended by the Crown, was out of order.” [No. 219, Speaker’s Decisions, H. of Comm. of Canada.]

“(v.) *On the 27th May, 1875, it was decided by the Speaker :—*

“That petitions praying for the passing of an Act authorising the Commissioner of Customs to grant an exemption from duty, cannot be received unless recommended by the Crown, as they involve a public charge.” [No. 225, Speaker’s Decisions, H. of Comm. of Canada.]

“(vi.) *On the 15th April, 1870, it was decided by Speaker Cockburn :—*

“That a Bill from the Senate containing clauses respecting public expenditure was not open to the objection that such provisions could not originate in the Senate, when the last clause provided ‘that nothing in this Act shall give authority to the Minister to cause expenditure until previously sanctioned by Parliament.’ [No. 172, Speaker’s Decisions, H. of Comm. of Canada.]”

The provisions of the Australian Constitution as to money bills Australia. are contained in Secs. 53 to 56. Sec. 56 provides that “a vote, resolution or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.” The language of the section is very wide and appears to cover even the “imposition and appropriation of fines, penalties, forfeitures and fees* by the Senate.” As the practice is for the Governor-General to follow the advice of his Ministry in making

* *Vide* Section 53 of the British North America Act, 1867, quoted on page 108.

his recommendations as to the appropriation of revenue or moneys, the effect of the section would seem to be to limit the power of the Senate as to the passing of votes, resolutions, or proposed laws which are not required under the Constitution to originate in the House of Representatives. Even these cannot apparently be passed by the Senate unless they have been "recommended" by the Governor-General—*i.e.*, in practice, the Ministry in power.

Far the most important point, however, in connection with the relative powers of the two Houses of the Australian Federal Legislature as to legislation, is that which is concerned with the definition of the measures which must originate in the Lower House, and cannot be amended by the Upper House. As has been pointed out in the chapter on "the growth of the Australian Commonwealth," this point was one of the chief matters of contention between the smaller States and New South Wales and Victoria in the debates which preceded Federation. The final settlement is embodied in Secs. 53, 54 and 55. They are as follows :—

" 53. Proposed laws appropriating revenue or moneys or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

" The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the annual services of the Government.

" The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

" The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

" Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

" 54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation."

" 55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

" Laws imposing taxation, except laws imposing duties of custom or excise shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only."

The disabilities [of the Australian Senate as to money bills under these sections are well summarised and examined by Messrs. Quick and Garran.* Their effect is that :—

* " Annotated Const. Australian Comm.," pp. 663-679.

(i). AS TO AMENDMENT.

(a) *The Senate cannot amend proposed laws imposing taxation i.e. bills for the raising of money*—"charges or burdens on the people ; as for instance bills imposing customs and excise duties ; bills imposing stamp duties ; bills imposing succession duties ; bills imposing taxes on property."

(b) *The Senate cannot amend the ordinary appropriation bills :*
Now the annual public expenditure includes :—

- (1) *Ordinary Annual Expenses*—i.e., cost of the various public departments, for which grants are demanded each year in the Speech from the Throne ; the details are included in the yearly Estimates.
- (2) *Permanent Appropriation*—e.g., salaries of Governor, Ministers, and Judges. These are made by the Federal Parliament, to whose power of making such permanent appropriations there is no limit under the Federal Constitution.
- (3) *Extraordinary Expenses* which do not come within the meaning of ordinary annual services, e.g., appropriations of revenue or loan money for the construction of public works and buildings or for public purposes of a special character.

Of these three classes of public expenditure the disability of the Australian Senate as to amendment extends only to the first ; which is, of course, by far the largest and most important class. Thus "whilst the Senate could not amend an ordinary annual appropriation bill, it could with unquestionable constitutionality amend a public works bill, a railway construction bill, a harbour improvement bill, a bill relating to the salary of the Governor-General, a Bill relating to the salaries of Ministers of State, etc." But this should be taken subject to the limitation that—

(c) The Senate cannot amend any bill so as to increase proposed charges or burdens on the people.

(ii). AS TO INITIATION.

The limitation on the power of the Australian Senate is wider here than it is in respect to amendments. It extends to all "proposed laws appropriating revenue or moneys or imposing taxation" subject to the limitation in the first paragraph of Sec. 53. It must also be taken as subject to Sec. 54 which safeguards the Senate against the "tacking" of extraneous matters to the ordinary annual appropriation bill, and to Sec. 55 which provides a similar safeguard in respect of laws imposing taxation. It will be noticed that Secs. 53 and 54 apply to "proposed laws," whereas Sec. 55 applies to "laws." The effect of this difference is that any violation of Secs. 53 and 54 is a matter primarily of a transgression against the proper procedure of Parliament and would be dealt with by means of the rules relating to "order" ; whereas a violation of Sec. 55 is at once a matter of absolute illegality proper for the jurisdiction of the Federal Courts of Law. Taking the prohibition against initiation in conjunction with the prohibition against "tacking" imposed by Secs. 54 and 55,

it will be seen that the latter limits the former. The "tacking" prohibitions are safeguards to the Senate—guarantees that the initiatory power of the Lower House shall not be extended beyond money bills.*

III. THE TWO HOUSES OF THE SWISS LEGISLATURE.

The working of the Swiss Constitution—as far as the relations of the two Houses of the Federal Assembly are concerned—is so different to that of Constitutions which follow in this respect the British model that it is necessary to deal with it separately. The following quotation from Adams' "The Swiss Confederation" [pp. 46, 47] gives a brief sketch of the legislative relations of the two Houses of the Swiss Legislature :—

* "The right of initiative, exercised particularly as to bills and motions of various kinds, belongs to each Chamber and to each member. Thus, either Chamber can recommend to the Federal Council that it shall draw up and present a bill on a particular subject to the Federal Assembly, or a member can suggest one to his own Chamber, and if accepted it will then be referred to the Federal Council, with a request to draw up the necessary bill for the consideration of the Assembly ; or the Federal Council itself presents one upon its own initiative. The Cantons can also exercise the right of initiative by correspondence. It is clearly to be understood that every bill, from whatever source it has originated, must first come into the hands of the Federal Council, and be laid before the Assembly by that body. At the beginning of each session, the business is divided between the two Chambers. When a bill is presented to them by the Federal Council, the Chamber which has first to take it up begins by appointing a Committee of members to discuss its provisions, and report upon it. When the Committee is unanimous, there is but one report ; otherwise there are reports giving the conclusions of the majority and the minority. Then comes the discussion in the Chamber, and the Bill is ultimately either passed, with or without amendments, or rejected. In the former case it is referred to the other Chamber, where it undergoes similar treatment. If that Chamber accepts the text as presented to it, then the bill, being adopted by the two sections of the Assembly, becomes law and is published as such by the Federal Council ; subject, however, to the Referendum if duly demanded. But if the text is not accepted, then the bill is returned to the other Chamber with any amendments which may have been made, and a second, and sometimes even a third, debate takes place. If the amendments are adopted, or if a compromise between the two Chambers is agreed upon, the bill, subject as aforesaid [*i.e.*, to the Referendum if duly demanded], in its new form becomes law ; but if both

* Extract from the "South African News," 19th July, 1908:—"The Federal High Court of Australia has delivered judgment in favour of the defendants, two manufacturers of agricultural implements, in a case involving the question whether the Commonwealth Parliament has power to enact legislation for the regulation of wages, as contained in the Federal Excise Tariff Act, under which duties are levied on goods manufactured in Australia in the production of which fair and reasonable wages have not been paid. The High Court held that the action of the Commonwealth Parliament in enforcing wage conditions by means of excise duties was *ultra vires*. Chief Justice Sir Samuel Griffith and Justices Sir E. Barton and O'Connor held : (1) That the Act was outside the power of taxation conferred by the Constitution ; (2) that it was, in any case, in contravention of Section 55 of the Constitution which provides that a Taxation Act must not contain anything else ; (3) that the Constitution prohibits direct interference with matters reserved exclusively to the States ; and (4) that the Excise Tariff Act was invalid because it discriminated between States. The other two judges, Justices Isaacs and Higgins, dissented. No appeal is possible."

persist in their divergent opinions, it is lost. Sometimes, too, a bill is referred back to the Federal Council for re-consideration, and is subsequently laid before the Chambers in an altered form.

"After a law, a regulation, or a resolution has been adopted by both Chambers, the Federal Council publishes it officially, stating the date when it shall come into force, if that has not been done already in the text. Generally speaking, this may be expected to be the day of publication. But for those measures which are liable to the Referendum, what is termed a '*délai d'opposition*' is mentioned, being a period of three months during which the right of appeal to the popular vote can be exercised. If there is no appeal, the measure comes into force after the expiration of the three months."

IV. DEADLOCKS.

The "deadlock" provisions of the Australian Constitution represent an important innovation in the making of written Constitutions. Their history is briefly summarised in the chapter on "the growth of the Australian Commonwealth." In their final form—as modified in one particular [*i.e.*, that of the substitution of an absolute for a two-thirds majority at the joint sitting] by the Conference of Premiers held in 1899—they are contained in Sec. 57 of the Constitution, which is as follows :—

"If the House of Representatives passes any proposed law and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives in the same or the next session again passes the proposed law with or without any amendments which have been made, suggested or agreed to by the Senate, and the Senate rejects or fails to pass it or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

"If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested or agreed to by the Senate, and the Senate rejects or fails to pass it or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

"The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon any amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and the House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent."

There are one or two points in this section to which attention may be drawn. Firstly, the requirement of an absolute majority of the total number of Senators and Representatives (not merely of those present at the joint sitting) would seem to open the door to ultimate rejection of a bill by mere abstention from attendance at the joint sitting on the part of its opponents. But, as Messrs. Quick and Garran point out* the joint sitting represents the last stage in a long contest: "If the supporters of a proposal

* Ann. Const. Aust. Comm., p. 687.

do not number an absolute majority they will be unlikely to win in any case, and if they do number an absolute majority, it is very unlikely that any member of that majority will absent himself and thereby betray his party at the moment when victory is within their grasp." Secondly, the "joint-sitting" provision is one which is "founded on the practice of conflicting legislative Chambers at times appointing representatives to meet in conference authorised to discuss questions in dispute and to suggest possible modes of settlement." This practice is recognised in Great Britain and her Colonies as well as in the United States. Thirdly, the provision for dissolution of the Senate is an unique experiment. "No other second Chamber in any Federal system is liable to be dissolved on any question of general legislation. By the Swiss Constitution [Art. 120] if the two Chambers are unable to agree on the question whether there shall be a total revision of the Constitution, the question is then referred to the people; and if a majority of electors voting support a revision, both Chambers are dissolved and the work of revision devolves upon the new Federal Legislature. But in respect of ordinary legislation there is no such provision."*

* Ann. Const. Australian Comm., p. 687.

CHAPTER VI.

POWERS OF THE CENTRAL GOVERNMENT.

In considering the powers of the Central Government under any form of union between separate States, it is most important to appreciate the distinction between the respective ways in which such powers may be both conferred and exercised. The distinction is one which falls conveniently into a three-fold division—that between Legislative, Executive and Judicial powers. “The distinction between the departments undoubtedly is that the Legislature makes, the Executive executes and the Judiciary construes the law.”* But though this is in theory a fundamental distinction, it is not always easy in practice to draw the line between the three great departments of the exercise of the functions of Government. Messrs. Quick and Garran provide† an excellent analysis of the bearing of this difficulty upon the respective Federal Constitutions of the United States, Canada and Australia. “Judicial acts,” they say, “have of necessity points of contact with both executive and legislative acts. In Great Britain, owing to the supremacy of the legislative power, the distinction has not been the subject of decision in the Courts, though it is recognised by Commentators. [See Wharton’s Judicial Dictionary sub. tit. *Judges*.]

“In this Constitution, however [*i.e.*, the Australian Federal Constitution], each power is vested in distinct organs, and it becomes important to define the principles on which the distinction is based. A similar separation of functions is prescribed in the Constitution of the United States, as well as in the Constitutions of the States of the Union; and also, though to a less degree, in the Constitution of the Canadian Dominion. American and Canadian decisions are therefore important, but with some reservation in each case. The Constitution of the United States goes somewhat further in the separation of powers than this Constitution, because it not only vests them in distinct organs, but contains certain specific limitations, such as the prohibition on Congress and the State Legislatures to pass any bill of attainder or *ex post facto* law, and the prohibition on the State Legislatures to pass laws impairing the obligation of contracts [Art. 1., Secs. 9, 10]. On the other hand, the British North America Act does not go nearly so far; it does not expressly mention the ‘judicial power,’ and it does not establish a Federal judiciary as a co-ordinate department, but merely empowers the Dominion Parliament to establish Courts. [See *Lefroy*: ‘*Legislative power in Canada*,’ p. lvi.]”

In this connection Messrs. Quick and Garran quote two passages which throw some light on the point at issue:—

* Per Marshall, C.J., U.S., *Wayman vs. Southard*, 10 Wheat., 46.

† Ann. Const. Aust. Comm., pp. 720-723.

"Executive power is so intimately connected with legislative, that it is not easy to draw a line of separation ; but the grant of executive power to the department created for the purpose of executing it must be regarded as an exclusive grant, covering the whole power, subject only to the limitations which the Constitutions impose and to the incidental exceptions before referred to " [*i.e.*, cases where the exercise of executive functions by the Legislature is warranted by Parliamentary usage, and incidental, necessary or proper to the exercise of legislative authority]. [Cooley : *Constitutional Limitations*, p. 106.]

And as to the distinction between judicial and executive functions:—

"Doubtless the non-coercive part of executive business has no affinity with judicial business. . . . The same may be said, for the most part, of such coercive work of the executive as consists in carrying out decisions of Judges—*e.g.*, the imprisonment or execution of a convict. But there are other indispensable kinds of executive interference which have to be performed before or apart from any decisions arrived at by the judicial organ ; and in this region the distinction between executive and judicial functions is liable to be evanescent or ambiguous, since executive officials have to 'interpret the law' in the first instance, and they ought to interpret it with as much judicial impartiality as possible." [Sedgwick : "*Elements of Politics*," p. 358.]

[A rigid classification of the powers of a Central Government should include also "Incidental" and "Implied" powers, but these are hardly of such importance as to merit detailed consideration in a work of this nature.]

CHAPTER VII.

LEGISLATIVE POWERS OF THE CENTRAL GOVERNMENT.

The Legislative power of the Central Government in any form of union between several States may be considered under two main aspects ; firstly, that of the nature of the power itself, *i.e.*, whether it is the legislative exercise of a full or of a limited Sovereignty ; and, secondly, in its relation to the legislative powers of local Governments under the Central Government, *i.e.*, the *distribution* of the legislative power between the Central and the Local Governments.

As to the first point, there is, in most forms of union between several States, no question about the nature of the legislative power of the Central Government. That power is limited by the Constitution which creates the Legislature. Thus the Constitution of the United States [Art. VI., Sec. 2] says that "this Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." The point is clearly explained by *Dicey* (*Law of the Constitution*, p. 137):—"Every legislative assembly existing under a Federal Constitution is merely a subordinate law-making body, whose laws are of the nature of bye-laws, valid whilst within the authority conveyed upon it by the Constitution, but invalid or unconstitutional if they go beyond the limits of such authority." The authority conferred upon the Central Legislature by the Constitution is thus the limit of its authority in a union of several independent States. But in the case of unions of British Colonies under the British Crown there may be some question as to whether the power of the Central Legislature is 'plenary' or delegated by the Imperial Parliament. If it is to be considered as delegated, then it cannot in its turn be delegated. A good example of this kind of legislative authority is that of the Governor-General-of-India-in-Council. It has been decided that he could not create in India, and arm with legislative authority, a new legislative body not created or authorised by the Imperial Act constituting the Council of India.

The question has arisen whether a similar limitation applies to the legislative authority of the Central Parliament of a union of British Colonies. There is ample authority for saying that this is not so. For instance, in delivering the judgment of the Privy Council in *Hodge vs. The Queen* [9 App. Cas. 132], Lord Fitzgerald said :—*

* Quoted from *Wheeler* : "Confederation Law of Canada," p. 142.

"It appears to their Lordships that the objection raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of, or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in Sec. 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament ; but authority as plenal and as ample within the limits prescribed by Sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make bye-laws or resolutions as to subjects specified in the enactment and with the object of carrying the enactment into operation and effect."

This case was, it is true, one which turned on the powers of the Provincial Legislature of Ontario, but the language of the judgment is very far-reaching and would appear to establish the conclusion that the legislative power conferred on the Central Parliament of a union of British Colonies by an Act of the Imperial Legislature is plenary and not delegated. This conclusion of course depends to a certain extent on the wording of Sec. 91 of the British North America Act, viz. :—"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, etc." These words are repeated almost verbatim in Sec. 51 of the Constitution of Australia. The same conclusion as to the plenary nature of the legislative power of the Commonwealth Parliament would, therefore, seem to apply to that Constitution.

The question of the *distribution* of legislative power between the Central and Local Governments in a union of States is, however, one of far greater complexity. Both in the United States and Canada there has been a mass of legal decision on the subject with which it is impossible to deal adequately in a work of this scope. All that can be done is to give in the following chapter a very condensed summary of the provisions of the Constitutions of the United States, Canada, Switzerland and Australia ; and to indicate very briefly the outstanding points of difficulty in reconciling the respective legislative powers of the Central and Local Governments under those Constitutions.

Taking the Constitutions of the United States, Canada, Switzerland and Australia generally, the most important point of difference between the respective methods of the distribution of the legislative power is that in the United States, Switzerland and Australia the powers of the Central Government are strictly defined and limited, whilst those of the separate States are left undefined, whereas in Canada the very reverse is the case. Thus the tenth amendment to the Constitution of the United States says that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." And Sec. 51 of the Australian

Constitution says that "the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to" thirty-nine specified subjects;—the subjects not specially mentioned by the Constitution being left to the separate States.* Whereas the 91st Sec. of the British North America Act is as follows :—

"It shall be lawful for the Queen, by and with the consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces, etc."

This distinction is emphasized by Dicey [*Law of the Constitution*, p. 139].

"There exists one marked distinction in principle between the Constitution of the United States and the Constitution of the Canadian Dominion. The Constitution of the United States in substance reserves to the separate States all powers not expressly conferred upon the national government. The Canadian Constitution in substance confers upon the Dominion Government all powers not assigned exclusively to the Provinces. In this matter the Swiss Constitution follows that of the United States."

That this difference in principle was a difference deliberately adopted and intended by those who were responsible for framing the Dominion Constitution is shown by the concluding part of the following extract from the speech made by Lord Carnarvon, who was in charge of the British North America Act, when it came before the House of Lords. The whole extract is useful as showing the intentions of those who framed the Canadian Constitution with regard to the distribution of powers in general :—

"I now pass to that which is perhaps the most delicate and the most important part of this measure—the distribution of powers between the Central Parliament and the local authorities. In this is, I think, comprised the main theory and constitution of Federal Government; on this depends the practical working of the new system; and here we navigate a sea of difficulties—there are rocks on the right hand and on the left. If, on the one hand, the Central Government is too strong, then there is risk that it may absorb the local action and that wholesome self-government by the Provincial bodies, which it is a matter of both good faith and practical expediency to maintain; if, on the other hand, the Central Government is not strong enough, then arises a conflict of State rights and pretensions, cohesion is destroyed, and the effective vigour of the central authorities is encroached upon. The real object which we have in view is to give to the Central Government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the Provinces; and, at the same time, to retain for each Province so ample a measure of municipal liberty and self-government as will allow, and indeed compel them, to exercise those local powers which they can exercise with great advantage to the community. . . . In this Bill the division of powers has been mainly effected by a distinct classification. The classification is fourfold: 1st, those subjects of legislation which are attributed to the Central Parliament exclusively; 2nd, those which belong to the Provincial Legislatures exclusively; 3rd, those which are subjects of concurrent legislation; and 4th, a particular question which is dealt with exceptionally. To the Central Parliament belong all questions of the public debt or property, all regulations

* *Vide* also Article 3 of the Swiss Federal Constitution :—"The Cantons are sovereign, so far as their sovereignty is not restricted by the Federal Constitution, and as such they may exercise all rights which are not delegated to the Federal Power."

with regard to trade or commerce, customs and excise, loans, the raising of revenue by any mode or system of taxation, all provisions as to currency, coinage, banking, postal arrangements, the regulation of the census and the issue and collection of statistics. To the Central Parliament will also be assigned the enactment of Criminal Law. The administration of it, indeed, is vested in the local authorities ; but the power of general legislation is very properly reserved for the Central Parliament. And in this I cannot but note a wise departure from the system pursued in the United States, where each State is competent to deal as it may with its Criminal Code, and where an offence may be visited with one penalty in the State of New York, and with another in the State of Virginia. The system here proposed is, I believe, a better and safer one ; and I trust that before long the Criminal Law of the four Provinces may be assimilated—and assimilated, I will add, upon the basis of English procedure. Lastly, the fisheries, the navigation and shipping, the quarantine regulations, the lighting of the Coast, and the general question of naval and military defence, will be placed under the exclusive control of the Central Government.

“ The principal subjects reserved to the local Legislatures are the sale and management of public lands, the control of their hospitals, asylums, charitable and municipal institutions, and the raising of money by means of direct taxation. The several Provinces, which are now free to raise a revenue as they may think fit, surrender to the Central Parliament all powers under this head except that of direct taxation. Lastly, and in conformity with all recent Colonial legislation, the Provincial Legislatures are empowered to amend their own Constitutions.

“ But there is, as I have said, a concurrent power of legislation to be exercised by the Central and the Local Parliaments. It extends over three separate subjects—Immigration, Agriculture, Public Works. Of these the two first will, in most cases, probably be treated by the Provincial authorities. They are subjects which, in their ordinary character, are local ; but it is possible that they may have, under the changing circumstances of a young country, a more general bearing, and therefore a discretionary power of interference is wisely reserved to the Central Parliament. Public works fall into two classes : first those which are purely local, such as roads and bridges, and municipal buildings—and these belong, not only as a matter of right, but also as a matter of duty, to the local authorities. Secondly, there are public works which, though possibly situated in a single Province, such as telegraphs, canals and railways, are yet of common import and value to the entire Confederation, and over these it is clearly right that the Central Government should exercise a controlling authority.

“ In closing my observations upon the distribution of powers, I ought to point out that just as the authority of the Central Parliament will prevail whenever it may come into conflict with the local Legislatures, so the residue of legislation, if any, unprovided for in the specific classification which I have explained will belong to the central body. It will be seen, under the 91st clause, that the classification is not intended ‘ to restrict the generality ’ of the powers previously given to the Central Parliament, and that those powers extend to all laws made ‘ for the peace, order and good government ’ of the Confederation—terms which, according to all precedents, will, I understand, carry with them an ample measure of legislative authority. I will add that, whilst all general Acts will follow the usual conditions of Colonial legislation and will be confirmed, disallowed, or reserved for Her Majesty’s pleasure by the Governor-General, the Acts passed by the local Legislatures will be transmitted only to the Governor-General and be subject to disallowance by him within the space of twelve months.”

CHAPTER VIII.

DISTRIBUTION OF LEGISLATIVE POWER.

The distribution of legislative power under the American Constitution is contained in Article I., Secs. 8, 9 and 10. The provisions of these sections are as follows :—

Section 8.—"The Congress shall have power :—

"(1) To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

"(2) To borrow money on the credit of the United States.

"(3) To regulate commerce with foreign nations, and among the several States and with the Indian tribes.

"(4) To establish an uniform rule of naturalisation, and uniform laws on the subject of bankruptcies throughout the United States.

"(5) To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

"(6) To provide for the punishment of counterfeiting the securities and current coin of the United States.

"(7) To establish post offices and post roads.

"(8) To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

"(9) To constitute tribunals inferior to the Supreme Court.

"(10) To define and publish piracies, and felonies committed on the high seas and offences against the Law of Nations.

"(11) To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

"(12) To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

"(13) To provide and maintain a Navy.

"(14) To make rules for the government and regulation of the military and naval forces.

"(15) To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.

"(16) To provide for organising, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

“(17) To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings ; and

“(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof.”

The powers thus conferred are limited by :—

Section 9 :—

“(1) The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding 10 dollars for each person.

“(2) The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.

“(3) No bill of attainder or *ex post facto* law shall be passed.

“(4) No capitation or other direct tax shall be laid unless in proportion to the *Census*, or enumeration hereinbefore directed to be taken.

“(5) No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another ; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.

“(6) No moneys shall be drawn from the Treasury, but in consequence of appropriations made by law ; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

“(7) No title of nobility shall be granted by the United States : And no person holding any office of profit or trust under them shall, without the consent of the Congress accept of any present, emolument, office or title of any kind whatever from any King, Prince, or Foreign State.”

On the other hand, the powers of the separate States are limited by :—

Section 10 :—

“(1) No State shall enter into any treaty, alliance, or confederation ; grant letters of marque and reprisal ; coin money ; emit bills of credit ; make anything but gold and silver coin a tender in payment of debts ; pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or grant any title of nobility.

“(2) No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws ; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress lay any duty of tonnage, keep troops or ships of war, in time of peace, enter into any agreement or compact with another State or with a Foreign Power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.”

An admirable analysis of the effect of this distribution of legislative power under the American Constitution is given by Mr. Bryce ["The American Commonwealth," Vol. I., Chaps. XXVII.-XXX.]. He points out that "the distribution of powers between the National and the State Governments is effected in two ways—*positively*, by conferring certain powers on the National Government; *negatively*, by imposing certain restrictions on the States. It would have been superfluous to confer any powers on the States, because they retain all powers not actually taken from them." There are certain things which are forbidden both to the Central and the States Government. Thus neither Congress nor any State can grant a title of nobility. Nor can any State or Congress pass an *ex post facto* law. "What the Constitution has done—and this is to Englishmen one of its most singular features—is not to cut in half the totality of governmental functions and powers, giving part to the National Government and leaving all the rest to the States, but to divide up this totality of authority into a number of parts which do not exhaust the whole, but leave a residuum of powers neither granted to the Union nor continued to the States, but reserved to the people, who, however, can put them in force only by the difficult process of amending the Constitution. In other words, there are things in America which there exists no organised and permanent authority capable of legally doing—not a State, because it is expressly forbidden; not the National Government, because it either has not received the competence or is expressly forbidden."

Mr. Bryce also points out that the list of prohibitions imposed on the *separate States* does not extend to "any of the following things: Establish a particular form of religion; endow a particular form of religion, or educational or charitable institutions connected therewith; abolish trial by jury in civil or criminal cases; suppress the freedom of speaking, writing and meeting [provided that this be done equally as between different classes of citizens, and provided also that it be not done to such an extent as to amount to a deprivation of liberty without due process of law]; limit the electoral franchise to any extent; extend the electoral franchise to women, minors, aliens. These omissions are significant. They show that the framers of the Constitution had no wish to produce uniformity among the States in government or institutions, and little care to protect the citizens against abuses of State power. Their chief aim was to secure the National Government against encroachments on the part of the States, and to prevent causes of quarrel both between the Central and State authorities and between the several States. The result has, on the whole, justified their action. So far from abusing their power of making themselves unlike one another, the States have tended to be too uniform, and have made fewer experiments in institutions than one could wish."

The following extract supplies a very clear definition of the nature of the respective powers of Central and State Governments:

"The powers vested in each State are all of them original and inherent powers, which belonged to the State before it entered the Union. Hence they are *prima facie* unlimited, and if a question arises as to any particular power it is presumed to be enjoyed by the State, unless it can be shown to have been taken away by the Federal Constitution; or, in other words, a State is not deemed to be subject to any restriction which the Constitution has not distinctly imposed. The powers granted to the National Government are delegated powers, enumerated in and defined by the instrument which has created the Union. Hence the rule that when a question arises whether the National Government possesses a particular power, proof must be given that the power was positively granted. If not granted, it is not possessed, because the Union is an artificial creation, whose Government can have nothing but what the people have by the Constitution conferred. The presumption is therefore against the National Government in such a case, just as it is for the State in a like case."

Finally, Mr. Bryce emphasises the fact that, although the Constitution of the United States does not give the Federal Government power to coerce a recalcitrant or rebellious State, "it follows from the recognition of the indestructibility of the Union [which was established by the judgment of the Supreme Court in the case of *Texas vs. White*] that there must somewhere exist a force capable of preserving it." The National Government is now admitted to be such a force. "It can exercise all powers essential to preserve and protect its own existence and that of the States, and the Constitutional relation of the States to itself and to one another."

Exclusive and
Concurrent
Powers.

There is a further question—whether the powers granted to the Federal Government are *exclusive* powers or whether the State Governments still have *concurrent* powers of legislation on those subjects. Story* quotes the Federalist as showing that the Federal Government has exclusive power of legislation only in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising a like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. The first two cases, he says, are self-evident; the difficulty lies in the application of the principle embodied in the third case. "Unless, from the nature of the power, or from the obvious results of its operations, a repugnancy must exist, so as to lead to a necessary conclusion that the power was intended to be exclusive, the true rule of interpretation is that the power is merely concurrent."

As to the exercise of concurrent powers, Story defines the principles of their exercise by the Federal and State Governments respectively. In the first place, "if there be a conflict between the laws of the Union and the laws of the States—the former being supreme—the latter must of course yield." From this he deduces three corollaries:—

* Comm. on the Constitution of the United States, secs. 435-449.

- "(1) That if a power is given to create a thing, it implies a power to preserve it."
- "(2) That a power to destroy, if wielded by a different hand, is hostile to and incompatible with this power to create and preserve."
- "(3) That where this repugnancy exists, the authority which is supreme must control, and not yield to that over which it is supreme. Consequently, the inferior power becomes a nullity."

Story then raises the "more delicate" question: "How far in the exercise of a concurrent power, the legislation of Congress supersedes the State legislation, or suspends its operation over the subject matter. Are the State laws inoperative only to the extent of the actual conflict; or does the legislation of Congress suspend the legislative power of the States over the *subject matter*?" To such an inquiry, he says, there is probably no universal answer. "It may depend upon the nature of the power, the effect of the actual exercise, and the extent of the subject matter."

"We may, however," he continues, "lay down some few rules, deducible from what has been already said, in respect to cases of implied prohibitions upon the existence or exercise of powers by the States, as guides to aid our inquiries.

"(1) Wherever the power given to the general Government requires that, to be efficacious and adequate to its end, it should be exclusive, there arises a just implication for deeming it exclusive. Whether exercised or not, in such a case makes no difference.

"(2) Wherever the power in its own nature is not incompatible with a concurrent power in the States, either in its nature or exercise, there the power belongs to the States.

"(3) But in such a case, the concurrency of the power may admit of restrictions or qualifications in its nature or exercise. In its nature, when it is capable, from its general character, of being applied to objects or purposes which would control, defeat or destroy the powers of the general government. In its exercise, when there arises a conflict in the actual laws and regulations made in pursuance of the power by the general and State Governments. In the former case there is a qualification grafted upon the generality of the power, excluding its application to such objects and purposes. In the latter there is [at least generally] a qualification, not upon the power itself, but only upon its exercise, to the extent of the actual conflict in the operations of each.

"(4) In cases of implied limitations or prohibitions of power, it is not sufficient to show a possible or potential inconvenience. There must be a plain incompatibility, a direct repugnancy or an extreme practical inconvenience, leading irresistibly to the same conclusion.

"(5) If such incompatibility, repugnancy or extreme inconvenience would result, it is no answer that, in the actual exercise of the power, each party may, if it chooses, avoid a positive interference with the other. The objection lies to the power itself and not to the exercise of it. If it exist, it may be applied to the extent of controlling, defeating or destroying the other. It can never be presumed that the framers of the Constitution—declared to be supreme—could intend to put its powers at hazard upon the good wishes or good intentions or discretion of the States in the exercise of their acknowledged powers.

"(6) Where no such repugnancy, incompatibility or extreme inconvenience would result, then the power in the States is restrained, not in its nature, but in its operations; and then only to the extent of the actual interference. In fact, it is obvious that the same means may often be applied to carry into operation different powers. And a State may use the same means to

effectuate an acknowledged power in itself, which Congress may apply for another purpose in the acknowledged exercise of a very different power. Congress may make that a regulation of commerce which a State may employ as a guard for its internal policy, or to preserve the public health or peace, or to promote its own peculiar interests. These rules seem clearly deducible from the nature of the instrument; and they are confirmed by the positive injunctions of the Xth Amendment of the Constitution."

Canada.

The Clauses of the British North America Act relating to the distribution of legislative power between the Dominion and the Provincial Parliaments are :—

Sec. 91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces ; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say :—

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The Raising of Money by any Mode or System of Taxation.
4. The Borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country, or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Sec. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated ; that is to say :—

1. The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.
2. Direct taxation within the Province in order to the raising of a revenue for provincial purposes.
3. The borrowing of money on the sole credit of the Province.
4. The establishment and tenure of provincial offices, and the appointment and payment of provincial officers.
5. The management and sale of public lands belonging to the Province, and of the timber and wood thereon.
6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province.
7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals.
8. Municipal institutions in the Province.
9. Shop, saloon, tavern, auctioneer, and other licences, in order to the raising of a revenue for provincial, local, or municipal purposes.
10. Local works and undertakings, other than such as are of the following classes—
 - a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings, connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province.
 - b. Lines of steamships between the Province and any British or foreign country.
 - c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the general advantage of two or more of the Provinces.
11. The incorporation of Companies with provincial objects.
12. Solemnization of marriage in the Province.
13. Property and civil rights in the Province.
14. The administration of justice in the Province, including the constitution, maintenance, and organisation of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.
16. Generally all matters of a merely local or private nature in the Province.

Sec. 93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions :—

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province of the Union ;
2. All the powers, privileges, and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and the school trustees of the Queen's Roman Catholic subjects, shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec ;
3. Where in any Province a system of separate or dissentient schools exist by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education ;

4. In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

Sec. 94. Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the courts in those three Provinces, and from and after the passing of any Act in that behalf, the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted ; but any Act of the Parliament of Canada making provision for such uniformity, shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof.

Sec. 95. In each Province the Legislature may make laws in relation to agriculture in the Province, and to immigration into the Province ; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any of the Provinces, and to immigration into all or any of the Provinces ; and any law of the Legislature of a Province, relative to agriculture or to immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

The intention underlying this distribution of powers was very clearly described by Lord Carnarvon in introducing the Act into the House of Lords: His speech is quoted on p. 119.

As illustrating its effect in practice and the principles which have been followed by the Courts in its interpretation, the following extract from the judgment of the Privy Council in the case of the *Citizens' Insurance Co. of Canada vs. Parsons* may be found useful :—*

“ The scheme of this legislation, as expressed in the first branch of Sec. 91, is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the Provincial Legislature. If the 91st section had stopped here, and if the classes of subjects enumerated in Sec. 92 had been altogether distinct and different from those in Sec. 91, no conflict of legislative authority could have arisen. The Provincial Legislatures would have had exclusive power over the sixteen classes of subjects assigned to them, and the Dominion Parliament exclusive power over all matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been, and could not be, attained, and that some of the classes of subjects assigned to the Provincial Legislature unavoidably ran into and were embraced by some of the enumerated classes of subjects in Sec. 91 ; hence an endeavour appears to have been made to provide for cases of apparent conflict ; and it would seem that with this object it was declared in the 2nd branch of the 91st section ‘ for greater certainty, but not so as to restrict the generality of the foregoing terms of this section,’ that [notwithstanding anything in the Act] the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of Sec. 91 was introduced, though it may be observed that this paragraph applies, in its grammatical construction only to No. 16 of Sec. 92.

* Quoted by Wheeler : “ Confed. Law of Canada,” p. 47.

“Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislatures should be absorbed in those given to the Dominion Parliament. Take, as one instance, the subject of ‘Marriage and Divorce,’ contained in the enumeration of subjects in Sec. 91. It is evident that solemnization of marriage would come within this general description, yet ‘solemnization of marriage in the Province’ is enumerated among the classes of subjects [Sub-Sec. 12] in Sec. 92, and no one can doubt, notwithstanding the general language of Sec. 91, Sub-Sec. 26, that this subject is still within the exclusive authority of the Legislatures of the Provinces. So ‘the raising of money by any mode or system of taxation’ is enumerated among the classes of subjects [Sub-Sec. 3] in Sec. 91; but though the description is sufficiently large and general to include ‘direct taxation within the Province in order to the raising of a revenue for Provincial purposes,’ assigned to the Provincial Legislatures by Sec. 92 [Sub-Sec. 2], it obviously could not have been intended that, in this instance also, the general power should over-ride the particular one. With regard to certain classes of subjects generally described in Sec. 91, legislative power may reside, as to some matters falling within the general description of these subjects, in the Legislatures of the Provinces. In these cases it is the duty of the Courts to ascertain in what degree and to what extent authority to deal with matters falling within these classes of subjects exists in each Legislature and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together and the language of one interpreted and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all. In performing this difficult duty it will be a wise course for those on whom it is thrown to decide each case which arises as best they can without entering more largely upon an interpretation of the Statute than is necessary for the particular question in hand.

“The first question to be decided is, whether the Act impeached in the present Appeal falls within any of the classes of subjects enumerated in Sec. 92, and assigned exclusively to the Legislatures of the Provinces; for if it does not, it can be of no validity and no other question would then arise. It is only when an Act of the Provincial Legislature *prima-facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in Sec. 91, and whether the power of the Provincial Legislature is or is not thereby over-borne.”

The whole matter—as far as the Canadian Constitution is concerned—is well summed up by Mr. Lefroy “*Legislative Power in Canada*” [pp. 310-364], in the following propositions:—

- i) “Secs. 91 and 92 of the British North America Act purport to make a distribution of legislative powers between the Parliament of Canada and the Provincial Legislatures [subject to the provisions of the Act itself], Sec. 91 giving a general power of legislation to the Parliament of Canada [within the territorial limits of the Dominion] subject only to the exception of such matters as by Sec. 92 are made the subjects upon which the Provincial Legislatures are exclusively to legislate.
- (ii.) “[With the exception of laws in relation to agriculture and immigration*], if the subject-matter of an Act is within the jurisdiction of the Dominion Parliament, it is not [in its entirety] within the jurisdiction of the Provincial Legislatures [whether acting severally or in concert with each other,] though some of the provisions of such

* For this exception *vide* Sec. 95, B.N.A. Act.

Act, ancillary to the main subject of legislation, may be within such Provincial jurisdiction; and if the subject-matter of an Act is not within the jurisdiction of the Provincial Legislatures [acting either severally or in concert with each other], it is within the jurisdiction of the Dominion Parliament.

- (iii.) "With the exception of agriculture and immigration, there is no subject-matter over which there can [speaking strictly, be said to] exist concurrent powers of legislation; and even then [*i.e.*, in relation to agriculture and immigration], should there be conflict, the authority of the Parliament of Canada is supreme, by express provision of Sec. 95 of the British North America Act."

But the language of the last Proposition should be taken as being subject to the following [Lefroy: "*Legislative Power in Canada*," pp. 393-415]:—

"Subjects which, in one aspect and for one purpose, fall within the jurisdiction of the Provincial Legislatures may, in another aspect and for another purpose, fall within the jurisdiction of the Dominion Parliament."

And the two, taken together, are finally stated by Mr. Lefroy [pp. 425-468] thus:—

"In assigning to the Dominion Parliament legislative jurisdiction in respect to the general subjects of legislation enumerated in Sec. 91 of the British North America Act, the Imperial Statute, by necessary implication, intended to confer on it legislative power to interfere with [deal with and encroach upon] matters otherwise assigned to the Provincial Legislatures under Sec. 92, so far as a general law relating to those subjects so assigned by it may affect them [as it may also do to the extent of such ancillary provisions as may be required to prevent the scheme of such a law from being defeated]."

Each of these propositions is discussed by Mr. Lefroy with a wealth of reference to leading cases on the Constitution-Law of Canada decided both by the Canadian Courts and the Privy Council. Even when thus baldly stated, however, they perhaps define as clearly as possible the distribution of legislative power in Canada between the Dominion and the Provincial Legislatures: Certainly they provide an instructive comment upon the success of those who formed the Canadian Constitution in their attempt to avoid the pitfalls of the Constitution of the United States in this matter of the respective legislative rights of the Central and Provincial Legislatures.

Switzerland.

In Switzerland, "the object of the Confederation is declared to be to insure the independence of the country against foreign nations, to maintain internal tranquility and order, to protect the liberty and rights of the Confederated citizens, and to increase their common prosperity.

"The Cantons are stated to be sovereign so far as their sovereignty is not limited by the Federal Constitution, and, as such, they exercise all rights not delegated to the Federal power. The Confederation guarantees their sovereignty within the limits aforesaid, the liberty and rights of the people, the constitutional rights of citizens, as well as the rights and powers which the people have conferred upon the authorities. The Cantons are obliged

to demand from the Confederation a guarantee of their respective Constitutions, which is accorded upon condition that the same do not contain anything contrary to the stipulations of the Federal Constitution, that they ensure the exercise of political rights according to republican forms, and that they are accepted by the people and capable of revision when the absolute majority of the citizens demand it."*

The distribution of legislative power under the Swiss Constitution is as follows :—

I.—Powers held and exercised by the Central Government :—

- (i.) To declare war, make peace and conclude treaties [though the Cantons can conclude treaties with foreign countries, or make agreements among themselves on matters of local interest, so long as those treaties or agreements contain nothing contrary to the Confederation or to the interests of other Cantons. Over such treaties and agreements the Central Government exercises only the right of supervision].
- (ii.) To have complete control of the Army ; and manufacture and sell powder.
- (iii.) To direct and appropriate all receipts from the postal, telegraphic and telephonic systems.
- (iv.) To coin money ; issue and repay bank-notes.
- (v.) To manufacture and sell spirituous liquors.
- (vi.) To control all matters of revenue and levy import and export duties.
- (vii.) To legislate on matters involving questions of civil capacity, copyright, bankruptcy and patents [also measures of sanitary police with reference to epidemics of a dangerous nature]
- (viii.) To expel from its territory foreigners who compromise the internal or external security of Switzerland.
- (ix.) "To create, besides the existing polytechnic school at Zürich, a Federal University and other establishments for superior education, or to subsidize them."† [This right has not yet been exercised.]

II.—Powers of Central Government exercised through the Cantons :—

- (i.) To order, or encourage by subsidies, public works for the benefit of all, or a considerable part of Switzerland ; to enforce expropriations ; to supervise dykes, forests in mountainous regions, torrents and the re-planting of woods.
- (ii.) Laws concerning fishing and shooting.
- (iii.) To control agreements made by the Cantons as to railway concessions ; and the joining up of Swiss railways with those of neighbouring States.

* Adams : "The Swiss Confederation," p. 29.

† Adams : "The Swiss Confederation," p. 31.

III.—Powers held by the Cantons as sovereign States :—

- (i.) Civil law, except as to the civil capacity of persons ; criminal law ; administration of civil and criminal justice [though certain matters of justice are left to the exclusive cognizance of the Federal tribunal].
- (ii.) Cantonal and local police.
- (iii.) Organisation of the Communes.
- (iv.) Public works in general.
- (v.) Education. To provide elementary instruction, which is obligatory and gratuitous. Organisation of schools—subject to the Federal power mentioned above.

Australia.

The following analysis of the distribution of legislative power under the Australian Federal Constitution is taken from the Annotated Constitution of the Australian Commonwealth [pp. 933-937] :—

“ The Parliament of each State is a creation of the Constitution of the State. The Constitution of each State is preserved and the Parliamentary institutions of each State are maintained without any structural alteration, but deprived of power to the extent to which their original legislative authority and jurisdiction has been transferred to the Federal Parliament. In the early history of the Commonwealth, the States will not seriously feel the deprivation of legislative power intended by the Constitution, but as Federal Legislation becomes more active and extensive the powers contemplated by the Constitution will gradually be withdrawn from the States Parliaments and absorbed by the Federal Parliament. The powers to be so withdrawn may be divided into two classes—‘ exclusive ’ and ‘ concurrent. ’ Exclusive powers are those absolutely withdrawn from the State Parliaments and placed solely within the jurisdiction of the Federal Parliament. Concurrent powers are those which may be exercised by the State Parliaments simultaneously with the Federal Parliament, subject to the condition that, if there is any conflict or repugnancy between the Federal Law and the State Law relating to the subject, the Federal Law prevails and the State Law to the extent of its inconsistency is invalid.

“ EXCLUSIVE POWERS.—The following are the powers which in course of time will be absolutely withdrawn from the States :—

(1) “ Power to make laws with respect to the seat of Government [Sec. 52—i.]. This power will become exclusive on the acquisition of the territory within which the seat of Government is situated [Sec. 125].

(2) “ Power to make laws with respect to places acquired by the Commonwealth for public purposes [Secs. 52—i. and 122].

(3) “ Power to make laws with respect to any part of a State surrendered by the State to, and accepted by, the Commonwealth [Sec. 111] ; or to territory placed by the Queen under the authority of, and accepted by, the Commonwealth [Sec. 122].

(4) “ Power to make laws with respect to departments of the Public Service transferred to the Commonwealth [Sec. 52—ii.]. This power will become exclusive immediately upon the transfer of the departments.

(5) “ Power to make laws imposing duties of Customs and of Excise [Sec. 90]. This power will become exclusive on the imposition of uniform duties of Customs.

(6) “ Power to make laws granting bounties on the production or export of goods [Sec. 90]. According to the literal words of the Constitution this power does not become exclusive until the imposition of uniform duties of Customs.

(7) "Power to make laws with respect to the Naval and Military defence of the Commonwealth and of the States [Sec. 51—vi.]. This power becomes exclusive on the establishment of the Commonwealth [Sec. 114].

(8) "Power to make laws with respect to the coinage of money [Sec. 51—xii. and Sec. 115].

(9) "Power to make laws with respect to legal tender in anything but gold and silver coin [Sec. 115]."

"Of the 39 classes of subjects enumerated in Sec. 51, with respect to which the Federal Parliament has power to make laws, 13 are quite new and are applicable only to the Commonwealth, having been created by the Constitution, and are of such a character that they could only be vested in and effectually exercised by the Federal Parliament. They are:—

(1) "Borrowing money on the public credit of the Commonwealth [Sub-Sec. iv.].

(2) "Fisheries in Australian waters beyond territorial limits [Sub-Sec. x.].

(3) "The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States [Sub-Sec. xxiv.].

(4) "The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States [Sub-Sec. xxv.].

(5) "External affairs [Sub-Sec. xxix.].

(6) "The relations of the Commonwealth with the Islands of the Pacific [Sub-Sec. xxx.].

(7) "The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws [Sub-Sec. xxxi.].

(8) "The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State [Sub-Sec. xxxiii.].

(9) "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State [Sub-Sec. xxxv.].

(10) "Matters in respect of which this Constitution makes provision until the Parliament otherwise provides [Sub-Sec. xxxvi.].

(11) "Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred or which afterwards adopt the law [Sub-Sec. xxxvii.].

(12) "The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned of any power which can, at the establishment of this Constitution, be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia [Sub-Sec. xxxviii.].

(13) "Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth [Sub-Sec. xxxix.].

"Three of the 39 classes of subjects mentioned in the sub-sections to Sec. 51, viz. :—

(1) "Bounties (except aids on mining for gold, silver or metal)—after the imposition of uniform duties of Customs [Secs. 51—iii. and 90].

(2) "Naval and Military defence [Secs. 51—vi. and 114].

(3) "Coinage and legal tender [Secs. 51—xii. and 115];

formerly vested in the States—are exclusively within the competence of the Federal Parliament. Trade and Commerce is a concurrent power, but a branch of it, viz., the power to impose duties of Customs and Excise, becomes exclusively vested in the Federal Parliament on the imposition of uniform duties of Customs [Sec. 90]. This leaves in the list of 39 subjects [under Sec. 51] 23 old powers which formerly belonged to the States, but are now concurrently vested in the State Parliaments and the Federal Parliaments, subject to the condition imposed by Sec. 109.

" These Concurrent Powers are as follows:—

- (1) " Astronomical and meteorological observations [51—viii.].
- (2) " Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper-money [Sec. 51—xiii.].
- (3) " Bankruptcy and Insolvency [51—xvii.].
- (4) " Bills of Exchange and Promissory Notes [51—xvi.].
- (5) " Census and Statistics [51—xi.].
- (6) " Copyrights, Patents of Inventions and Designs and Trade Marks [51—xviii.].
- (7) " Divorce and Matrimonial Causes; and in relation thereto, Parental rights, and the custody and guardianship of infants [51—xxii.].
- (8) " Foreign Corporations, and trading or financial Corporations formed within the Commonwealth [51—xx.].
- (9) " Immigration and Emigration [51—xxvii.].
- (10) " Influx of Criminals [51—xxviii.].
- (11) " Insurance, other than State Insurance; also State Insurance extending beyond the limits of the State concerned [51—xiv.].
- (12) " Invalid and Old Age Pensions [51—xxiii.].
- (13) " Lighthouses, Lightships, Beacons and Buoys [51—vii.].
- (14) " Marriage [51—xxi.].
- (15) " Naturalisation and Aliens [51—xix.].
- (16) " People of any race, other than the aboriginal race, in any State, for whom it is deemed necessary to make special laws [51—xxvi.].
- (17) " Postal, Telegraphic, Telephonic, and other like services [51—v.].
- (18) " Quarantine [51—ix.].
- (19) " Railways, control with respect to transport for Naval and Military purposes of the Commonwealth [51—xxxii.].
- (20) " Railway Construction and Extension in any State with the consent of that State [51—xxxiv.].
- (21) " Taxation, but so as not to discriminate between States or parts of States [51—ii.].
- (22) " Trade and Commerce with other countries, and among the States [51—i.]; except that on the imposition of uniform duties of Customs the power to impose duties of Customs and Excise becomes exclusively vested in the Federal Parliament [Sec. 90].
- (23) " Weights and Measures [51—xv.]. "

" RESIDUARY LEGISLATIVE' POWERS.—The residuary authority left to the Parliament of each State after the Exclusive and Concurrent grants to the Federal Parliament, embraces a large mass of constitutional, territorial, municipal and social powers, including control over:—*Agriculture* and the cultivation of the soil; *Banking*—State banking within the limits of the State; *Borrowing Money* on the sole credit of the State; *Bounties* and Aids on mining for gold, silver or metals; *Charities*—establishment and management of Asylums; *Constitution of State*—amendment, maintenance and execution of; *Corporations*—other than foreign corporations and trading or financial corporations; *Courts*—civil and criminal, maintenance and organisation for the execution of the laws of a State; *Departments of State Governments*—regulation of; *Education*; *Factories*; *Fisheries within the State*; *Forests*; *Friendly Societies*; *Game*; *Health*; *Inspection* of goods imported or proposed to be exported in order to detect fraud or prevent the spread of disease; *Insurance*—State insurance within the limits of the State; *Intoxicants*—regulation and prohibition of the manufacture within the State of fermented, distilled, or intoxicating liquids; *Justice*—Courts; *Land*—management and sale of public lands within the State; *Licences*—regulation of the issue of licences to conduct trade and industrial operations within the State, such as liquor licences and auctioneers' licences (subject, however, to Sec. 92); *Manufactures*—see *Factories*; *Mines and Mining*; *Municipal Institutions and Local Government*; *Officers*—appointment and payment of public officers of the State; *Police*—regulations, social and sanitary; *Prisons*—State prisons and reformatories; *Railways*—control and construction of Railways within the State, subject to Constitutional limitations [see

Restricted Powers']; The same limitation of being subject to Constitutional provisions applies also to all the following :—*Rivers* ; *Shops* ; *Taxation* for raising revenue for State purposes ; *Trade and Commerce* within the State ; *Works*—construction and promotion of public works and internal improvements."

"RESTRICTED POWERS.—Some powers reserved to the States can only be exercised *sub modo*—subject to conditions and limitations specified by the Constitution :—

"*Bounties*.—A State may, with the consent of both Houses of the Federal Parliament expressed by resolution, grant any aid or bounty on the production or export of goods [Sec. 91].

"*Naval and Military Forces*.—A State may, with the consent of the Federal Parliament, raise and maintain Naval and Military Forces [Sec. 114].

"*Railways*.—A State may construct, use, and control its railways, but subject to Federal control with respect to transport for naval and military purposes of the Commonwealth (Sec. 51—xxxii.), and subject to the rule that in the use and control of its railways the State may be forbidden to make any preferences or discriminations which, in the judgment of the Inter-State Commission, are undue and unreasonable, or unjust to any State [Sec. 102].

"*Rivers*.—A State and its residents have the right to the reasonable use of the water of rivers within the State for conservation or irrigation [Secs. 98, 100].

"*Taxation of Federal Property*.—A State may, with the consent of the Federal Parliament, impose any tax on property of any kind belonging to the Commonwealth [Sec. 114].

"*Taxation*.—A State may impose taxation so long as it does not conflict with Federal taxation, and so long as it does not violate the rule of Inter-State freedom of trade and commerce. It is forbidden to impose duties of Customs and Excise after the imposition of uniform duties of Customs by the Federal Parliament [Secs. 90 and 92].

"NEW LEGISLATIVE POWERS.—By the Federal Constitution certain new legislative powers are conferred on the Parliament of each State, the exercise of which is necessary for the Constitution of the Federal Parliament. The Parliament of each State is permanently endowed with power to make laws for determining the times and places of elections of Senators for the State [Sec. 9]. Until the Federal Parliament otherwise provides : The Parliament of each State may make laws prescribing the method of choosing the Senators of that State." [And certain other new powers of the same nature which are dealt with in the Chapters on the Composition of the Upper and Lower Houses.]]

In addition to this classification of legislative powers under the Australian Constitution, it should be noted that Sec. 109 of that Constitution makes definite provision for a conflict between laws passed by the Commonwealth and the State Parliaments. Thus :—

Section 109. "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

Upon this section, Professor Moore ["Commonwealth of Australia," pp. 172-175] makes the following comment :—

"This provision operates where the State law conflicts with some exercise of power by the Commonwealth Parliament, not where it is inconsistent with the power itself. It assumes that each Legislature is acting within its proper range of power, where the State law would be good and operative but for the exercise of paramount power by the Commonwealth Parliament, the case

which has been described in America as that in which the State law fails, 'not because it is unconstitutional, but because it is superseded by the paramount authority of the national legislature.'* It applies whether the State law has been passed after the Commonwealth law or the Commonwealth law has been passed after the State law."

And, generally, it may be said that in considering the effect of this section, the principles laid down earlier in this chapter, in discussing the question of the distribution of legislative power under the Constitution of the United States, should again be kept in mind.

* Hare : " American Constitutional Law," p. 98.

CHAPTER IX.

THE EXECUTIVE.

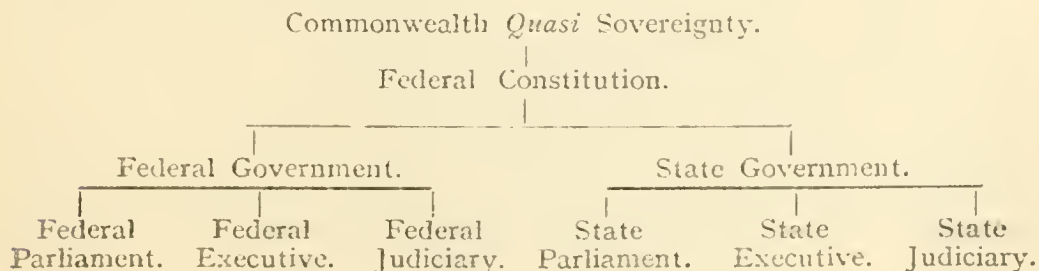
The British North America Act [Sec. 9] makes the following Canada. provision for the exercise of the Executive power of the Dominion Government :—" The Executive Government and authority of and over Canada is hereby declared to continue and to be vested in the Queen." This Section makes no provision for the exercise of the executive power vested in the Queen except by Her Majesty herself. But as has already been pointed out in the chapter on " The Governor-General," the exercise of this power, vested in the Queen, is committed to the Governor-General by virtue of the Letters Patent issued to him on his appointment.

The Constitution of Australia is more explicit upon this point. Australia. It provides [Sec. 61] that :—

" The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution and the laws of the Commonwealth."

To ascertain the exact meaning of the word " Commonwealth " in this Section it is necessary to refer to Section 6 of the Act constituting the Commonwealth of Australia, which covers and legalises the Constitution itself. That Section says that " the Commonwealth shall mean the Commonwealth of Australia as established under this Act."

Messrs. Quick and Garran [Annot. Const. Australian Comm., p. 368] define the Commonwealth as " a *Quasi-National State* [or *Semi-National State*] composed of a homogeneous and related people of ethnic unity, occupying a fixed territory of geographical unity, bound together by a common Constitution, under a dual system of provincial and central Government, each supreme within its own sphere and each subject to the common Constitution." Upon this definition they base [p. 701] the following analysis of the powers of the Commonwealth :—



This analysis is quoted here subject to what has been said in the chapter on "Powers of the Central Government" in order to define clearly the exact extent of the executive power of the Commonwealth which is conferred upon the Governor-General, as representing the Queen, by Sec. 61 of the Australian Constitution.

Executive Council.

As has already been stated in the chapter on "The Governor-General," the Queen's representative both in Canada and Australia is assisted in the performance of certain of his executive duties by a Council. In Canada this Council is called the "Privy Council," and is constituted by Sec. 11 of the British North America Act :—

Canada.

"There shall be a Council to aid and advise in the government of Canada, to be styled the Queen's Privy Council for Canada; and the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and members thereof may be from time to time removed by the Governor-General."

Sec. 62 of the Australian Constitution is almost identical in its terms :—

Australia.

"There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as the Executive Councillors, and shall hold office during his pleasure."

Responsible Government.

In both Canada and Australia the system of responsible government prevails. In Canada the British custom has been followed, and both the responsibility and power of the Ministers of the Crown is established, not by express enactment of the Constitution, but by recognised constitutional practice. In the Constitution of Australia, on the other hand, a remarkable departure from the British custom is made. Sec. 64 provides that :—

"The Governor-General may appoint officers to administer such Departments of State of the Commonwealth as the Governor-General in Council may establish.

"Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be *the Queen's Ministers of State for the Commonwealth*.

"After the first General Election no Minister of State shall hold office for a longer period than three months unless he is, or becomes, a Senator or a member of the House of Representatives."

This Section crystallises into a definite enactment the traditional constitutional practice of Great Britain and her Colonies. Messrs. Quick and Garran* give an interesting resume of the Convention debates which led to the express mention in the Constitution of "the Queen's Ministers of State for the Commonwealth." Those reasons are fairly summed up in the following extract from a speech made by Mr. Deakin to the Sydney Convention of 1891 :—

"Complete as is the skeleton of Constitutional Government which the Hon. Member, Sir S. Griffith, has given us in these clauses, I maintain that it is, after all, only a skeleton, and that the life which is implied by its being administered by responsible Ministers has yet to be imparted to it. We do not desire to introduce words which might seem to claim for Australia royal prerogatives, but we do wish to introduce words claiming all the prerogatives of the Crown directly relating to Australia. What we say is that these clauses as they stand do not with sufficient distinctness make that claim, and that

*Ann. Const. Aust. Comm., pp. 709-711.

we should seize every opportunity of placing points of this importance beyond all dispute, that we should embody in these clauses the claim of Ministers of the Commonwealth to exercise all the prerogatives of the Crown which may be necessary in the interests of the Commonwealth."

The following comment by Messrs. Quick and Garran puts the resultant position very concisely :—

"The object of the words [Queen's Ministers of State for the Commonwealth] is to secure a formal recognition of the authority of the Ministers of the Commonwealth individually and collectively. But they do more than that ; they formally recognise, not indeed every phase or feature of what is currently known as 'Responsible Government,' but the existence of a body something like a Cabinet within the Executive Council—a Committee whose members are individually Ministers of Departments and, collectively, 'the Queen's Ministers of State for the Commonwealth.' "

It may, however, reasonably be doubted whether the insertion of definite words recognising responsible government in a written Constitution may not have the effect of limiting, whilst it defines, the very wide and undefined powers which constitutional practice has conferred upon Ministers in Great Britain and in Canada and other Colonies. Thus Messrs. Quick and Garran suggest that a strict interpretation of the words of Sec. 64 might preclude the appointment of a Federal Minister without portfolio as a member of the Federal Cabinet in Australia.*

* The Composition and Powers of the Swiss Federal Executive are described in Appendix D.

CHAPTER X.

FUNCTIONS OF A CENTRAL JUDICATURE.

Functions of
Judicature of
United States.

"The importance of the establishment of a judicial department in the National Government [says Story in the remarkable four Sections of his Commentaries on the Constitution of the United States—Secs. 1574-1577—in which he defines the importance of the Central Judicature] has been already incidentally discussed under other heads. The want of it constituted one of the vital defects of the Confederation. And every Government must in its essence be unsafe and unfit for a free people where such a department does not exist, with powers co-extensive with those of the legislative department. Where there is no judicial department to interpret, pronounce and execute the law, to decide controversies and to enforce rights, the Government must either perish by its own imbecility, or the other departments of Government must usurp powers, for the purpose of commanding obedience, to the destruction of liberty. The will of those who govern will become, under such circumstances, absolute and despotic; and it is wholly immaterial whether power is vested in a single tyrant or in an assembly of tyrants. No remark is better founded in human experience than that of Montesquieu that 'there is no liberty if the judiciary power be not separated from the legislative and executive powers.' And it is no less true that personal security and private property rest entirely upon the wisdom and the stability of the Courts of Justice.

"In the National Government the power is equally as important as in the State Governments. The laws and treaties, and even the Constitution, of the United States would become a dead letter without it. Indeed, in a complicated Government like ours, where there is an assemblage of republics combined under a common head, the necessity of some controlling judicial power to ascertain and enforce the powers of the Union, is, if possible, still more striking. The laws of the whole would otherwise be in continual danger of being contravened by the laws of the parts. Even if there were no danger of collision between the laws and powers of the Union and those of the States, it is utterly impossible that, without some superintending judicial establishment, there could be any uniform administration or interpretation of them.

"Two ends, then, of paramount importance, and fundamental to a free government, are proposed to be obtained by the establishment of a national judiciary. The first is a due execution of the

powers of the Government ; and the second is a uniformity in the interpretation and operation of those powers and of the laws enacted in pursuance of them. The power of interpreting the laws involves necessarily the function to ascertain whether they are conformable to the Constitution or not ; and, if not so conformable, to declare them void and inoperative. As the Constitution is the supreme law of the land, in a conflict between that and the laws either of Congress or of the States it becomes the duty of the Judiciary to follow that only which is of paramount obligation. This results from the very theory of a republican constitution of government ; for otherwise the acts of the Legislature and Executive would in effect become supreme and uncontrollable, notwithstanding any prohibitions or limitations contained in the Constitution ; and usurpations of the most unequivocal and dangerous character might be assumed, without any remedy within the reach of the citizens. The people would thus be at the mercy of their rulers in the State and the National Governments ; and an omnipotence would practically exist, like that claimed for the British Parliament. The universal sense of America has decided that, in the last resort, the Judiciary must decide upon the constitutionality of the acts and laws of the general and State Governments, so far as they are capable of being made the subject of judicial controversy. It follows that when they are subjected to the cognizance of the Judiciary its judgments must be conclusive ; for otherwise they may be disregarded and the acts of the Legislature and Executive enjoy a secure and irresistible triumph. To the people at large, therefore, such an institution is peculiarly valuable ; and it ought to be eminently cherished by them. On its firm and independent structure they may repose with safety, while they perceive in it a faculty, which is only set in motion when applied to ; but which, when thus brought into action, must proceed with competent power if required to correct the error or subdue the oppression of the other branches of the Government. Fortunately, too, for the people, the functions of the Judiciary, in deciding on Constitutional questions, is not one which it is at liberty to decline. Whilst it is not bound to take jurisdiction if it should not, it is equally true that it must take jurisdiction if it should. It cannot, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. It cannot pass it by because it is doubtful. With whatever doubt, with whatever difficulties a case may be attended, it must decide it when it arises in judgment. It has no more right to decline the exercise of a jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution."

In this dignified and convincing exposition of the principles which underlie the functions of a Central Judicature, Story insists on three main points ; that the functions themselves are two-fold in their nature, involving both that of deciding whether the powers of the Union or State Governments are being exercised in conformity with the provisions of the Constitution, and that of securing uniformity

Functions summarized.

in the exercise of the constitutional powers of the Union and State Governments ; that the decision of the Central Judicature, when once given, must be absolute, and beyond question ; and that the Central Judicature is bound to give its decision on any point within its competence when called upon to do so, and only then.

In considering how far the principles thus stated are applicable to the Central Judicature of a Union of British Colonies, under the supreme authority of the British Crown, there are several important points to be insisted upon.

I. The ultimate Repository of Power in Great Britain, the United States, Canada and Australia.

Source of
Power.

United States.

Great Britain.

Union of British
Colonies.

It will have been noticed that Story, in the passage quoted above, specially makes a distinction between " the omnipotence claimed for the British Parliament " and the limited power of the Legislature of the United States. The distinction is fundamental. In the United States the people is sovereign in fact as well as in theory. The Constitution is the deliberate expression of the will of the people. From the Constitution the power of the three departments of Government—the Legislature, the Executive, and the Judiciary—is divided. And as the Constitution itself is subject to the will of the people and can be altered by the people, under conditions which have been deliberately accepted by them ; so the relative powers of either the Legislature, Executive or Judiciary can be altered or re-adjusted. In Great Britain, on the other hand, the Constitution is unwritten and the power of the State is reposed in the Sovereign and Parliament acting together. The power of Legislature, Executive and Judiciary is founded, not on the terms of the Constitution, but on the theory of delegation by the Sovereign. There can thus be no question in Great Britain of the Judiciary declaring a law passed by the Legislature and assented to by the Sovereign to be unconstitutional ; whereas in the United States it is—as has already been shown—one of the primary functions of the Judicature to declare whether a law passed by the Legislature is Constitutional or not.

The Constitution of a Union of British Colonies stands mid-way between the two. In so far as it is the deliberate expression of the desire of a number of separate Colonies to be united under one Central Government, and in so far as it expresses that desire in a written form, it approximates to the nature of the Constitution of the United States. In so far, however, as it depends for its ultimate validity upon the assent of the Legislature and Sovereign of Great Britain, acting in concert ; and in so far as it can only be altered with their consent, it approximates to the Constitution of Great Britain. The real nature of such a Constitution of a union of British Colonies can perhaps be best expressed by drawing a distinction between the actual and theoretical power of sanctioning or altering such a Constitution. In theory, that power is wholly vested in the Legislature and Sovereign of Great Britain acting together. In practice, the theoretical power is only exercised when

there is a clear expression of the desire of the people of such a Union to form or alter a Constitution on which the Union depends. That is to say, that theoretically the people of a number of British Colonies have no power to form or alter such a Union Constitution. In practice they have both powers to an almost equal extent with the people of the United States.

The point, however, for our immediate purpose is to determine in what way the position of the Central Judicature of a Union of British Colonies under the British Crown is affected by the intermediate position of such a Union between the Government of the United States on the one hand, and that of Great Britain on the other. That is to say: does the Central Judicature in such a Union occupy a position equal, and in some ways superior to that of the Legislature, as in the United States, or does it occupy only the subordinate position which the English Judicature holds as one of the Departments of State to which a part of the Sovereign power is delegated. And here it may be said at once that the mere fact of the existence of a written Constitution for a Union Government under any form of union except that of an absolute Legislative Union, imposes on the Central Judicature the task—as in the United States—of deciding, if it is called upon to do so, whether any Bill passed by the Central or State Legislatures is in excess of the powers granted to either by the terms of the Constitution. It also imposes on the Central Judicature the function of securing uniformity between laws passed by the State Legislatures and laws passed by the Central Legislature. Thus it is a necessary consequence of the establishment of a Central Judicature under a written Constitution that that Central Judicature should be endowed with the two functions designated by Story in the passage quoted above as characteristic of the Central Judicature of the United States. But whereas in the United States the Central Judicature performs those functions subject to no limitations except those which are imposed by the Constitution itself, the Central Judicature of a Union of Colonies under the British Crown performs the same functions under certain limitations which result from the fact that the Sovereign power over that Union is reposed in the Legislature and Sovereign of Great Britain acting together. These limitations are specifically dealt with below and in the chapter on “Appeal to the Privy Council.” Apart from these limitations, which result from the prerogative power of the British Crown, it may be said generally that the extent to which the Central Judicature of a Union of British Colonies is limited in the performance of its two main functions depends on the terms of the Constitution itself.

Effect upon
Judicature.

II. Comparison of Functions of Central Judicature in United States, Canada and Australia.

In the first place, it is a fact which is perhaps not sufficiently recognised by those who are in the habit of criticising adversely the performance of its functions by the Central Judicature of the United States, that many of the ways in which those functions have been performed have been the result—not of the two general

Specific
Constitutional
Provisions.

United States.

functions of the Court [*i.e.*, to decide on the constitutionality and regulate the uniformity of laws passed by the Central and State Legislatures]—but of certain special obligations laid upon the Central Court by specific clauses of the Constitution itself. For instance, the Supreme Court of the United States has met with unsparing denunciation for a decision [in the Dartmouth College case] as a result of which “the most enormous and threatening powers in our country have been created ; some of the great and wealthy corporations actually having greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence.”* But this decision, with all its evil consequences, rests upon the specific Constitutional prohibition upon the State Legislatures against passing any legislation impairing the obligation of contracts ; the Supreme Court having held that this prohibition also applies to the Central Legislature on the ground that so to legislate is not among the powers granted to that body. Mr. Lefroy [“Legislative Power in Canada”] cites many other instances of limitations upon the power of the Central and State Legislatures, under the Constitution of the United States ; such, for instance, as the prohibition against depriving any person of life, liberty or property without due process of law [Amendment V.] ; and he points out with great force that similar prohibitions are not included in the British North America Act.

Identity of Functions.

But, while this is perfectly true, it is most important—in making a comparison between the functions of the Central Judicature in the United States, and in Canada or Australia—to emphasise the fact that the functions of the two are identical, though the way in which they are performed differs in accordance with the specific differences between the two Constitutions. Thus, when the Supreme Court of the United States declares a law passed by the Central or State Legislature to be unconstitutional because it violates the obligation of contract or deprives any person of life, liberty or property without due process of law, the Supreme Court of the United States is performing the same function as that which the Supreme Court of Canada or the High Court of Australia may at any moment be called upon to perform. The fact that the Supreme Court of the United States has to perform that function with reference to certain specific prohibitions in the Constitution of the United States, which prohibitions are not included in the Canadian or Australian Constitutions, and therefore are not within the purview of the Canadian or Australian Central Court in deciding whether any law passed by the Central or Local Legislatures is constitutional or not, does not affect the fact that both Courts are performing the same function. And the same argument applies to the function of securing uniformity between the legislation of the Central and the State Legislatures. The Central Courts of the United States, Canada and Australia are all charged with that function.

* Codey's “Constitutional Limitations,” 6th ed., p. 335”. Quoted by Lefroy : “Legislative Power in Canada,” p. lix.

The function is the same. But differences arise in the manner of its performance from the differences between the Constitutions of the three countries.

It is unnecessary to labour this point in its application to the Canadian or Australian Constitution. It is, indeed, little more than an expression of the distinction between the legislative, executive and judicial powers of government, which has already been referred to in the chapter on "the powers of the Central Government." And the nature of the distinction between the legislative and the judicial power is defined in more detail at the end of this chapter. But the following extract from a judgment of Henry, J.,* puts the duty of the Supreme Court of Canada in Canada, performing its functions so clearly that it may be quoted here :—

"It has been properly said that it is a serious matter to consider and decide that an act of a legislature is *ultra vires* ; but it is much more serious and unfortunate, by any judicial decision, to destroy the Constitution of a country. The importance of our decision arises, not nearly so much from any effect it may have upon the Act in question, which in itself claims from us the most patient and deliberate consideration, but from the general result, in view of the Constitutional relations established by the Imperial Act in question."†

And the importance of the duty of the Supreme Court of Canada in performing its functions, as affecting the rights of individuals, was insisted upon by O'Connor, J.‡ in the following words :—

"It is the privilege of every man to insist that his rights and interests shall be regulated by laws of undoubted validity. The sooner, then, a statute which is seriously believed by many, and especially by a considerable portion of the legal profession, to be unconstitutional is authoritatively pronounced upon the better. The public interest requires that proceedings under such a statute should be stayed if it be void ; or, if possessed of the authority it purports to have, it is necessary, or at least advisable, that doubts respecting it should be set at rest by a declaration of the proper tribunal, clothed with the necessary authority."§

Exactly the same principle applies to the exercise of its functions by the High Court of Australia. The real difference between the functions of the Central Judicature of the United States and that of Canada or Australia is that whereas those of the Supreme Court of the United States depend upon and are exercised under the Constitution without interference from any other department of the Government ; those of the Central Judicature in Canada and Australia are exercised subject to the influence of the Executive Department of the Government, which can be brought to bear in two ways. The first of these ways, by which the *direct* influence of the Executive can be brought to bear on the Judicature, has been already referred to. It is through the exercise of the Royal prerogative of granting leave to appeal to the Privy Council. The second, by which the functions of the Central Judicature of Canada or Australia are indirectly invaded, is the right of the Sovereign—acting either as the King in Council, or through a Governor—to veto legislation passed by either the Central or the

Limits to
Judicial Power.

Canada and
Australia.

City of Fredericton *vs.* the Queen. 3 S.C.R. at p. 545.

† Quoted by Lefroy : "Leg. Power in Canada," p. 266.

‡ Gibson *vs.* Macdonald : Ontario Appeal Rep. at p. 416.

§ Quoted by Lefroy : "Leg. Power in Canada," p. 267.

Local Legislature. This power of veto has been fully discussed in the chapter on "the Governor-General." As far as its influence upon the performance of the functions of the Central Judicature in Canada and Australia goes, it is rather an invasion of, than a limitation on, the functions of those Central Judicatures—as compared with the functions of the Central Judicature of the United States—inasmuch as it introduces an element which is quite foreign to the United States Constitution.

III. Distinction between Judicial and Legislative Functions.

Judicature and
Legislature.

It is difficult to draw the line between judicial and legislative functions in particular instances though the principle is clear :—

"It is said that that which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a pre-determination of what the law shall be for the regulation of all future cases falling under its provisions."*

But though this definition is clear so far as it goes, it does not completely cover the ground ; for plainly a law which declares or modifies existing rights, or which is retrospective, may have in practice the effect of a judicial decision. Messrs. Quick and Garran [Ann. Const. Aust. Comm., p. 721] give a very concise and clear summary of the practical difficulties which have arisen from the confusion of the legislative with the judicial functions of government. They point out that in the United States the matter is further complicated by those specific limitations on the judicial power—contained in the Constitution of the United States—to which reference has already been made in this chapter. As far as the judicial power in the United States is concerned, "the practical result is that retrospective or declaratory Acts [of the Legislature] have usually been held void, apart altogether from the question of invasion of the judicial power, so far as they disturbed existing rights."

But these specific limitations have not been included in the Constitution either of Canada or Australia. The question, therefore, which arises, as far as the relations of the judicial and legislative powers under those Constitutions are concerned, is :—What is the application of the principle stated above to a case "where the Courts have interpreted the existing law in one way, and the Legislature afterwards, by a declaratory enactment, has in effect declared the judicial interpretation to be unfounded and unwarrantable?" And here :—

"The simple rule would seem to be that, just as the Legislature cannot directly reverse the judgment of the Court, so it cannot by a declaratory law affect the rights of the parties in whose case the judgment was given. That is to say, the Legislature may *over-rule* a decision, though it may not *reverse* it ; it may declare the rule of law to be different from what the Courts have adjudged it to be and may give a retrospective operation to its declaration, except so far as the rights of parties to a judicial decision are concerned. In other words, the sound rule of legislation, that the fruits of victory ought not

* Cooley : "Constitutional Limitations," p. 91. Quoted in "Ann. Const. Aust. Comm.," p. 721.

to be snatched from the successful litigant, is elevated into a constitutional requirement ; but the general question of retrospective legislation is left to the discretion of the Legislature.*

" On the other hand, the Courts cannot be clothed with legislative or executive powers ; or decide questions which in their nature are not judicial but political." Thus there have been several instances in the United States of a refusal by the Court to interfere with the exercise of political discretion by the Executive. " The Congress is the legislative department of the Government ; the President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance."

" The distinction between the judicial and political powers has received recognition by English Courts. Thus it has been decided that political treaties between a foreign State and a subject of the Crown acting as an independent State under powers granted by charter are not subject to Municipal jurisdiction,† and a bill founded on such treaties was dismissed.‡

IV. *Performance of the functions of the Central Judicature :—*

Though the two functions of a Central Judicature are essential elements of government under a written Constitution, the whole tendency of the way in which those functions are performed is to conceal the fact of their being so performed. Thus Professor Moore§ points out that " the duty of passing [judgment] upon the validity of Acts, whether of the Commonwealth or of the State Parliaments, exists purely as an incident of the judicial power. . . . It is the duty of every Court to administer the law, of which the Constitution is a part and a superior part." And he quotes from Dicey || the following passage, which puts the essence of the theory of judicial action very clearly :—

" The Judges of the United States control the action of the Constitution, but they perform purely judicial functions, since they never decide anything but the cases before them. It is natural to say that the Supreme Court pronounces Acts of Congress invalid, but in fact this is not so. The Court never directly pronounces any opinion whatever upon an Act of Congress. What the Court does is simply to determine that in a given case A is or is not entitled to recover judgment against X ; but in determining that case, the Court may decide that an Act of Congress is not to be taken into account, since it is an Act beyond the constitutional powers of Congress."

Professor Moore goes on to point out that the Court will not decide a case which is merely fictitious and got up for the purpose of eliciting a decision upon the constitutionality of any Statute. In fact the Supreme Court of the United States has gone even further than that, and has decided that it cannot hear what is known as a " friendly " or " test " case, *i.e.*, " one in which are present all the facts which ordinarily give jurisdiction to the Courts and raise an issue . . . but [in which] there is a substantial identity of interest

* " Ann. Const. Aust. Comm.," p. 722.

† *i.e.*, the ordinary jurisdiction of English Courts.

‡ Nabob of Cainatica *vs.* East Ind. Co. 1 Ves. Jun., 375-393 ; 2 id., 56-60.

§ " The Commonwealth of Australia, p. 236.

|| " Law of the Constitution," p. 155.

of the parties, or the acts which give rise to the action have been done for the purpose of creating an issue to be tried." The English Courts, on the other hand, have frequently heard and decided such "friendly" suits. The reason for the different attitude of the English and American Courts is no doubt the fact that the English Courts have only to determine the *construction* or *meaning* of a law about whose *constitutionality* there can be no question; whereas the American Courts are constantly asked to say in effect whether a given law passed by the Legislature is *constitutional* or not. And here again the position of a Court established under a Union of British Colonies is between that of the United States and the British Courts. Thus in Canada the practice has arisen of questions affecting the constitutionality of legislative enactments being taken up by the public authorities. For instance, Professor Moore cites the case of *The Attorney-General for Ontario vs. Mercer*,* "where the contest was virtually as to whether certain prerogative rights in land belonged to the Crown in right of Ontario or of the Dominion of Canada. The defendant was content with the judgment of the Court of first instance, but the Dominion of Canada appealed in the name of the defendant, and was heard in the Supreme Court and in the Judicial Committee [of the Privy Council]. The latter treated the public character of the case as reason for making no order as to costs."

Judicature as
Adviser.

Closely related to this point of Canadian practice is the question whether either the Legislative or Executive departments of government can take the advice of the Judicature as to their constitutional powers. In Great Britain the House of Lords has power to consult the Judges, and the Crown can refer to the Judicial Committee of the Privy Council for hearing or consideration any matters which may seem fit. In Canada, also, as is stated in Appendix C, the Governor-General in Council, as well as either House of Parliament, may refer to the Supreme Court certain specific matters. The hearing of such a reference by the Dominion Supreme Court takes the form of a judicial proceeding; parties interested may be represented by counsel, "and the finding of the Court is practically a declaratory judgment, on which an appeal may be taken to the Queen in Council." In certain States of the United States a similar provision for reference to the Judicature has been made. But "such opinions [says Professor Moore] are never regarded by the Judges themselves as authoritative, and may be departed from by the Courts even when constituted by the Judges who have given the opinion; they are given under an obvious disadvantage, since the Judges have not the assistance of the arguments of counsel." On the other hand, the Supreme Court of the United States has set its face against the decision of matters brought before it merely on reference; and Professor Moore is of the opinion that "in the Commonwealth [of Australia], as in the United States, it is judicial power which is vested in the Courts, and it is clear that the advisory function is not included in that power, even when the Court may hear evidence and arguments to aid it in giving advice."†

* 1883. A.C., 767.

† "The Commonwealth of Australia," p. 242

CHAPTER XI.

ESTABLISHMENT AND JURISDICTION OF A CENTRAL JUDICATURE.

I. ESTABLISHMENT :

The Canadian Constitution contains no provision for the actual Canada. establishment of Central Courts, though Sec. 101 of the British North America Act says that "the Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organisation of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada."

Under the power given by this Section, the Supreme Court of Canada was established in 1875 by the Dominion Act 38 Vict., cap. 11. [Since amended by the Revised Statutes of the Dominion of Canada, 1886, cap. 135, and by 54 and 55 Vict., cap. 25.]* It holds its sittings three times a year at Ottawa—in February, May and October. It is presided over by a Chief Justice and five Puisne Judges, two of whom must have been members of the Quebec Bar, and all of whom must reside within five miles of the city of Ottawa. Its jurisdiction is detailed in Appendix C.

"The Exchequer Court is presided over by a single Judge, and can sit anywhere in Canada. It is also a Colonial Court of Admiralty [54 and 55 Vict. (Dom.) c. 29], having jurisdiction throughout Canada and its waters, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall have all rights and remedies in all matters connected with navigation, shipping, trade or commerce, as may be had or enforced in any Colonial Court of Admiralty under the Imperial Colonial Court of Admiralty Act, 1890, 53 and 54 Vict., c. 27. Local Courts of Admiralty have been established in accordance with the Dominion Act in Quebec, Nova Scotia, New Brunswick, British Columbia and Toronto district, the limits of which are elastic and may be altered by the Governor-in-Council." [Wheeler : "Confederation Law of Canada," p. 395.]

In contrast to that of Canada, the Constitutions of the United States and of Australia specifically provide for the establishment of Central Courts. Thus Article III., Sec. 1 of the United States Constitution says that :—

* A summary of the history, constitution and powers of the Provincial Courts in Canada is given by Wheeler : "Confederation Law of Canada" pp. 396-404.

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behaviour and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

Similarly, Sec. 71 of the Australian Constitution enacts :—

"The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates and in such other Courts as it invests with Federal jurisdiction. The High Court shall consist of a Chief Justice and so many other Justices, not less than two, as the Parliament prescribes."

And Section 72 provides that the Justices of the High Court and the other Federal Courts established by the Parliament are to be appointed by the Governor-General in Council ; cannot be removed except by the same agency acting on an address from both Houses of Parliament in the same session [which address alleges proved misdemeanour or incapacity] ; and are to receive such remuneration as the Parliament may fix, which remuneration cannot be diminished during their continuance in office.

Comparison.

Comparing the relative provisions of the Constitution of the United States with that of Australia, it will be seen that there are two important points of difference. In the first place the Australian Constitution adds the words "and in such other Courts as [the Parliament] invests with Federal jurisdiction." The American Constitution makes no provision for the granting of Federal jurisdiction to existing State Courts. It follows from this omission, according to Story ["Commentaries," Sec. 1593] :—

"That Congress is bound to create some inferior Courts, in which to vest all that jurisdiction which, under the Constitution, is *exclusively* vested in the United States, and of which the Supreme Court cannot take original cognizance." [See below under "Jurisdiction."]

Whereas the Federal Parliament of Australia can grant Federal jurisdiction to existing State Courts, and there is, therefore, no necessity for the *creation* of inferior Federal Courts. In the United States there are two classes of inferior Federal Courts, viz., nine Circuits, in which Courts are held annually, to each of which there is assigned one Circuit Judge and one Judge of the Supreme Court ; and about sixty District Courts, each presided over by a District Judge.

In the second place, under the American Constitution the whole apparel of the Federal Courts—number, personality and removal of Judges, etc.—is left to Congress. In the Australian Constitution, on the other hand, there is a distinction between the method of decision as to the number and as to the personality of the Judges of the Federal High Court. Their number is fixed by the Constitution at two at least and as many more as the Parliament prescribes, whereas their appointment is left to the Governor-General in Council, and their removal can be carried out by the Governor-General in Council only if he is acting upon the prayer of Parliament acting as one body and on specified grounds.

II. JURISDICTION :

Between the Jurisdiction of the Federal Courts in the United States and Australia there are also very important differences. Article III., Secs. 2 and 3, of the United States Constitution gives the Supreme Court original and exclusive jurisdiction "in all cases affecting ambassadors, other public ministers and Consuls, and those in which a State shall be a party" ; whilst in regard to "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; all cases of admiralty and maritime jurisdiction ; controversies to which the United States shall be a party ; controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States and between a State, or the citizens thereof, and foreign States, citizens or subjects" ; the Supreme Court has "appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

This brief summary of the jurisdiction of the Supreme Court of the United States must be taken as subject to the provisions of the XIth amendment, viz. :—

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

This amendment was passed as a consequence of the decision of the Supreme Court in the case of *Chisholm vs. State of Georgia* [2 Dall. 419] in which it was held that "a State could be sued in *assumpsit* by a citizen of another State ; that service of process on the Governor and Attorney-General of the defendant was sufficient to confer jurisdiction upon the United States Court ; and that the State failing to appear after such summons, judgment by default could be rendered against it." [Vide Baker : "Annotated Constitution, United States," p. 127.] In the case of "*In re Ayers*"* [123 U.S. at p. 505], the object of this amendment was discussed by Mr. Justice Matthews :—

"The very object and purpose of the XIth amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instigation of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large *residuum* of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to, and controlled by the mandates of judicial tribunals without their consent, and in favour of individual interests."

Besides the bearing of the XIth Amendment, there has been a mass of legal decision in the United States with which it is impossible—even if it were necessary—to attempt to deal here. A condensed summary of the cases on the point will be found in

* Quoted by Baker : Ann. Const. U.S., p. 206.

Baker's "Annotated Constitution," and the subject is discussed in a connected and reasoned manner by Story: "Commentaries" (4th Ed., Chap. XXXVIII.). All that can be done here is to quote Baker's summary of a few of the outstanding cases in which questions of principle were decided—thus:—

Dodge vs. Woolsey [18 How. 331]. "The Constitution vests in the Supreme Court a jurisdiction for its final interpretation and for the laws passed by Congress, to give them an equal operation in all of the States. Also to determine when the laws of the States conflict with the Federal Constitution and with the laws of Congress." [B. p. 122.]

Kentucky vs. Dennison [24 How. 66]. "The Supreme Court of the United States may exercise its *original* jurisdiction in suits against a State, under the authority conferred by the Constitution, without any further Act of Congress to regulate its process. The Court may regulate and mould the process it uses in such manner and form as in its judgment is promotive of justice." [B. p. 137.]

Martin vs. Hunter's Lessee [1 Wheat. 304]. "The appellate jurisdiction of the Supreme Court of the United States extends to a final judgment or decree in any suit in the highest Court of Law or Equity of a State, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favour of their validity; or the construction of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the Constitution, treaty, statute or commission.

"Such judgment or decree may be re-examined by writ of error in the same manner as if rendered in a Circuit Court.

"If the cause has been once remanded, and the State Court refuses or declines to carry into effect the mandate of the Supreme Court thereon, this Court will proceed to final decision of the same and award execution thereon.

"If the validity or construction of a treaty of the United States is drawn in question, and the decision is against its validity, or the title specially set up by either party under the treaty, this Court has jurisdiction to ascertain that title and determine its legal validity, and is not confined to the abstract construction of the treaty itself." [B. p. 139.]

Australia. Original Jurisdiction.

The Sections of the Australian Constitution defining the *original* jurisdiction of the High Court are Nos. 75, 76 and 77. The Constitution itself confers upon the High Court original jurisdiction:

- "In all matters
 - (1) "Arising under any treaty.
 - (2) "Affecting Consuls or other representatives of other countries.
 - (3) "In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.
 - (4) "Between States, or between residents of different States, or between a State and a resident of another State.
 - (5) "In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth." [Sec. 75.]

On the other hand, the Constitution gives the Federal Parliament power to make laws conferring on the High Court original jurisdiction:

'In any matter

- (1) "Arising under this Constitution or involving its interpretation
- (2) "Arising under any laws made by the Parliament.
- (3) "Of Admiralty and maritime jurisdiction.
- (4) "Relating to the same subject-matter claimed under the laws of different States." [Sec. 76.]

And, as to matters mentioned in both Secs. 75 and 76, the Federal Parliament is given power to make laws:

- (1) "Defining the jurisdiction of any Federal Court other than the High Court.
- (2) "Defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to, or is invested in the Courts of the States.
- (3) "Investing any Court of a State with Federal jurisdiction." [Sec. 77.]

As far as the jurisdiction conferred on the High Court by Sec. 75 of the Australian Constitution is concerned, there are one or two salient points of comparison with the provisions of the American Constitution. In the first place, the American Constitution confers only *appellate* jurisdiction in "controversies to which the United States shall be a party"; and in "cases arising under . . . treaties made, or which shall be made, under this authority"; whereas both of these cases are brought under the *original* jurisdiction of the High Court by Sec. 75 of the Australian Constitution. The other outstanding points of comparison are well summarised by *Messrs. Quick and Garran* [Ann. Const. Aust. Comm., p. 774], as follows:—

"Notwithstanding the XIth Amendment, a State can still be sued by another State of the Union though enjoying immunity from being sued by citizens of such other State. The result of this distinction was that attempts were made by States, whose citizens had claims against another State, to prosecute these claims on behalf of their citizens; but these attempts were defeated, it being held that a State could not in this way 'create' a controversy with another State. [*New Hampshire vs. Louisiana*; *New York vs. Louisiana*, 108 U.S., 76.] The provisions of this Constitution, however, make no distinction between a plaintiff State and a plaintiff resident of that State.

"Again, though the Supreme Court of the United States has *original* jurisdiction in cases where a State is a party, it has only *appellate* jurisdiction in cases 'between citizens of different States.' Accordingly in an action of ejectment between citizens of different States in respect of land over which both States claimed jurisdiction, it was held that the Supreme Court had no *original* jurisdiction, inasmuch as a State was neither nominally nor substantially a party; and it was not sufficient that the State might be consequently affected by having to compensate its grantee. [*Fowler vs. Lindsey*, 3 Dall, 411; see *Kent*, Comm. I., 323.]

"The judicial power of the United States extends to controversies 'between a State, or the citizens thereof, and foreign States, citizens or subjects.' In this Constitution there is no such provision."

A further point is that in Sub-Sec. (4), Sec. 75 of the Australian Constitution, the word *resident* is substituted for the word *citizen* in the corresponding provision of the American Constitution—an alteration which may have important legal results, especially in the case of Corporations. In the cases of *Louisville R. Co. vs. Letson* [2 How. 497], *Steamship Co. vs. Tugman* [106 U.S., 118], and *Memphis etc., R.R. Co. vs. Alabama* [107 U.S., 581], the United States Court—reversing previous decisions—decided that a Corporation created and doing business in a State was an inhabitant of a State, capable of being treated as a citizen for all purposes of jurisdiction; and conclusively presumed that the members of a Corporation were citizens of the State in which the Corporation was created. "According to writers on

International Law, supported by English decisions, the residence of an incorporated company is determined by the place in which its administrative business is carried on." [See *Westlake* : "*Private International Law*," 285 ; *Lindley* : "*Company Law*," p. 910.]*

Australia.
Appellate
Jurisdiction.

The *appellate* jurisdiction of the High Court of Australia is defined by Sec. 73 of the Constitution :—

"The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences :

- (1) "Of any Justice or Justices exercising the original jurisdiction of the High Court ;
- (2) "Of any other Federal Court or Court exercising Federal jurisdiction" or of the Supreme Court of any State, or of any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council ;
- (3) "Of the Inter-State Commission, but as to questions of law only ; and the judgment of the High Court in all such cases shall be final and conclusive

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

"Until the Parliament otherwise provides, the conditions of, and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court "

The question of appeals to the Privy Council from the decisions of the Federal High Court or the Supreme Courts of the several States of Australia is dealt with in Chapter XII. The only other sections of the Commonwealth Act which need be noticed in connection with the jurisdiction of the Central Tribunal in Australia are Sec. 78, which gives the Federal Parliament power "to make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power," Sec. 79, which allows the Federal jurisdiction of any Court to be exercised by "such number of Judges as the Parliament prescribes" ; and Sec. 80, which says that :—

'The trial on indictment of any offence against any law of the Commonwealth shall be by Jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.'

Switzerland.

The Constitution of the Swiss Federal Tribunal rests upon a law passed upon the adoption of the Constitution of 1874 by the Federal Assembly and an amending Act passed in 1893. There are now sixteen members of the Federal Judiciary, elected for six years by the Federal Assembly, which appoints the President and Vice-President every two years. Sixteen substitutes are also elected for the six years' term. Federal Judges are capable of re-election at the end of their term. The salary of the President is £440 per annum, and that of the other Judges £400 per annum.

* *Quick & Garran* : "*Ann. Const. Australian Comm.*," p. 777.

Every Swiss citizen eligible for the National Council can be elected ; but a Judge cannot also be a member of the Federal Council or Assembly, or be appointed as an official by the Federal Council or Assembly, or follow any profession.

The jurisdiction of the Swiss Federal Tribunal falls under four heads :

I. As a Court of Original Civil Jurisdiction :

It can decide cases :—

- (i.) Between the Confederation and one or more Cantons
- (ii.) Between Cantons.
- (iii.) Between individuals or corporations as plaintiff and the Confederation as defendant, if the matter in dispute amounts to 3,000 francs.
- (iv.) Between Cantons and Corporations or Individuals ; if one party demands trial before the Federal Tribunal and the amount in dispute is 3,000 francs.
- (v.) Between Communes of different Cantons as to disputed questions of citizenship.
- (vi.) As to homeless people, expropriations for railways or public works, civil questions between the Confederation and Railway Companies and the winding-up of the latter.
- (vii.) Questions which by the Constitution or the legislation of a Canton [duly ratified by the Federal Assembly] are entrusted to its competency.
- (viii.) Questions brought before it by agreement between the parties, where the amount in dispute is 3,000 francs

II. As a Court of Civil Appeal :

Cases where the Federal laws have to be applied by Cantonal tribunals and the amount in dispute is 3,000 francs or cannot be estimated ; either party can appeal against the judgment of the highest Cantonal tribunal. [This includes Federal laws respecting contracts, other than those relating to real estate ; copyright ; trade-marks ; divorce and nullity of marriage.]

III. As a Court of Criminal Jurisdiction :

For this purpose the Swiss Federal Tribunal is divided into three sections—the Chamber of Accusation ; the Criminal Chamber, which holds the Federal Assizes ; and the Court of Criminal Appeal [*Tribunal de Cassation*].

As a Court of Criminal Jurisdiction the Swiss Federal Tribunal has cognisance of the following cases :—

- (i.) High Treason against the Federation.
 - (ii.) Revolt or violence against Federal authorities.
 - (iii.) Crimes and offences against International Law.
 - (iv.) Crimes and political offences which are the cause or the consequence of troubles occasioning an armed intervention by the Federal authority.
 - (v.) Charges against officials appointed by a Federal authority, when the latter makes application to the Federal Tribunal.
- It has also, by Statute, jurisdiction over certain minor offences.

IV. As a Court to decide upon questions of Public Law :

Under Article 113 of the Constitution of 1874 it has cognizance of :—

- (i.) Conflicts of competency between Federal and Cantonal authorities.
- (ii.) Such disputes between Cantons as are within the domain of Public Law.
- (iii.) Claims for violation of rights of citizens or corporations guaranteed by the Federal or by a Cantonal Constitution
- (iv.) Federal laws which have been passed in execution of the Federal Constitution.
- (v.) Claims of individuals or of corporations for violation of concordats [agreements] between Cantons, as well as of treaties with foreign countries.

[N.B.—These details as to the Swiss Federal Tribunal are taken from Messrs. Adams and Cunningham's book on "The Swiss Confederation," published in 1889. At the end of their chapter on the Federal Tribunal the authors point out that "the Federal Council has announced its intention of presenting before long a new law which will introduce extensive modifications." The law thus referred to was passed in 1893. The number of Judges and substitutes was raised to sixteen of each. But the changes in the jurisdiction of the Federal Tribunal do not seem to have been very material. *Vide*, upon the whole question, *Lowell*, "*Governments and Parties in Continental Europe*," Vol. II, pp. 214-220.]

CHAPTER XII.

APPEAL TO THE PRIVY COUNCIL.

The right of appeal to the Privy Council, from the Courts of a Union of States under the British Crown, is a subject of extreme complication. In Canada there have been a multitude of decided cases—of very varying importance—which have turned upon this point ; whilst in Australia the clause in the draft Constitution, sent for the approval of the Imperial Parliament, which attempted to define the right of appeal to the Privy Council from the Courts of Federated Australia, was the clause which caused most contention between the Australian delegates and the Law Officers of the Crown. This has been briefly alluded to in the chapter on “ the growth of the Australian Commonwealth.” Not only was this so, but since the Australian Federal Constitution came into operation the clause relating to Privy Council appeals has given occasion for constant friction. With the latter fact, however, we have in this work nothing to do. All that has here been attempted is to give a brief outline of the practice that obtains in Canada as to appeals to the Privy Council—founded as it is on the accumulated results of a long series of decisions ; and to supply an equally brief outline of the provisions of the Australian Constitution on the point. For in this respect, as in many others, the Constitution of Australia is more explicit than that of Canada.

To take first the case of Canada, the student of this important subject will find an exhaustive, though not very clear or connected account of the various enactments and legal decisions with regard to the right of appeal to the Privy Council from both the Provincial and the Dominion Courts, in Wheeler's *Confederation Law of Canada* [pp. 396, 406, 410-483]. The short sketch which follows is however, taken in the main from Todd's *Parliamentary Government in the British Colonies* [pp. 304-312]. As stated by Todd, the Canadian practice can be very briefly summarised. It was pointed out in Chapter XI. of this book that the British North America Act makes no provision for the establishment of a Dominion Court, though it gives the Dominion Parliament power to make such provision. In Appendix C the various Acts passed by the Dominion Parliament, as to the establishment of a Supreme Court for the Dominion, are reviewed. The Act of 1875, establishing the Supreme Court, contains a clause declaring that—

"The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard, saving any right which her Majesty may be graciously pleased to exercise by virtue of her royal prerogative."

Two questions arise under this clause : Firstly, does it take away the right of appeal to the Privy Council from the Canadian Supreme Court ? Secondly, Does it, by implication, restrict the right of appeal to the Privy Council from the highest Provincial Court of last resort, without reference to the Dominion Supreme Court ? To both these questions the answer is in the negative. In fact, there is nothing in the section to prevent a Provincial Court of last resort from granting leave to a party to appeal to the Privy Council although the adverse party to the same suit has previously obtained leave, from the same Court, though on application to another Judge in chambers, to appeal from the same judgment to the Supreme Court of Canada.

Double Right
of Appeal.

"This double appeal," says the Registrar of the Supreme Court of Canada, "which exists as a matter of statutory right, may seem an anomaly, but in practice no difficulty has resulted from it. The statement that the judgment of the Supreme Court is final is subject to some qualification. As has been said, the section of the Supreme and Exchequer Courts Act which declares that the judgment of the Supreme Court shall be final, also says 'saving any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal prerogative'; and an appeal may be allowed to the Privy Council from the judgment of the Supreme Court of Canada [except in criminal appeals and also election appeals, as will be seen hereafter], and in fact many such appeals have been allowed, not as a matter of statutory right, but of grace. The exercise of the prerogative in this direction would therefore prevent any evil which might be threatened from conflicting judgments. Further, it may reasonably be assumed that in the event of concurrent appeals being taken, the Supreme Court would withhold its decision pending the result of the appeal to the Privy Council."*

Grant of Leave
to Appeal.

In several cases the Privy Council has declared its reluctance to entertain appeals from the Supreme Court of Canada, "except where the case is one of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount." It will not allow an appeal on a question merely of fact, and "parties petitioning for leave to appeal must state succinctly, but fully, the grounds on which they make their application; and must afterwards confine their proceedings to those grounds." Generally, it may be said that though the Privy Council—through its Judicial Committee—has again and again asserted its right to grant leave to appeal from the judgments of the Supreme Court of Canada; it has consistently regarded itself as bound by the desire of the Dominion Parliament—expressed in the section of the Act of 1875 which is quoted above—that the

* Quoted by Todd : "Parl. Govt. in Brit. Col., p. 309.

judgments of the Supreme Court of Canada shall be final, and has only granted leave as an act of grace to be exercised only in cases of general interest and importance.

As far as appeals to the Privy Council from Provincial Courts are concerned, they can only take place after leave to appeal has been granted by the Court against whose judgment the appeal is to be brought. That leave will only be granted if the sum in dispute exceeds a certain amount. Thus in Quebec the amount in dispute must exceed £500, and in Ontario 4,000 dollars.

There are, however, two cases in which there is no appeal to the Privy Council.

Cases in which there is no Appeal.

(1) 51 *Vic. c. 43, sec. 5* enacts that* :—"Notwithstanding any Royal prerogative no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal by which in the United Kingdom appeals or petitions to Her Majesty in Council may be heard."

(2) *Under an Act of the Quebec Parliament* giving jurisdiction to the Judges of the Superior Court to try election petitions, declaring that "such judgment shall not be susceptible of appeal," the Privy Council—whilst safeguarding itself against any admission that the prerogative of the Crown to grant leave to appeal can be taken away by anything less than an express enactment of a Colonial Parliament to that effect—has refused in two cases to hear an appeal on an election matter from that Province, on the ground that the Act had received the assent of the Crown and that its clear intention was to exempt the judgment in such matters from any such appeal; more especially as the Court had been given jurisdiction to try election cases in substitution for the Legislative Assembly of the Province.

The history of the clause in the Australian Constitution dealing with appeals to the Privy Council is a very interesting and not an uninteresting one. It is excellently summarised in "The Annotated Constitution of the Australian Commonwealth" [pp. 748-750]. In the Commonwealth Bill of 1891 it was proposed to give the Federal Parliament power to require that any appeal to the Privy Council that had hitherto been allowed from the State Courts should be made to the Federal Courts instead; whilst the Queen was to have power to allow an appeal to herself "in any case in which the public interests of the Commonwealth, or of any State, or of any part of the Queen's dominions, are concerned." At the Adelaide Convention in 1897 the clause was adopted in the form of a prohibition against any appeal to the Privy Council, either from the State Courts or the Federal Court "except that the Queen may, in any matter in which the public interests of the Commonwealth, or of any State, or of any other part of her dominions are concerned, grant leave to appeal to the Queen in Council from the High Court."

* The validity of this Act is held to be doubtful by the writers of text-books; but it has never been disputed in practice.

Thus the suggestion of the Commonwealth Bill of 1891 was practically adopted by the Adelaide session of the Convention of 1897-1898. But at the subsequent sessions it was objected that the clause as it stood would allow an appeal to the Privy Council in the very cases which were specially of a kind to be finally decided in Australia—*i.e.*, those in which the interpretation of the Constitution was involved. The words, “in which the public interests of the Commonwealth, or of any State, or of any other part of Her Dominions are concerned,” were therefore omitted and in their place were inserted the words “not involving the interpretation of the Constitution of the Commonwealth or of a State, or in any matter involving the interests of any other part of Her Majesty’s dominions.” Attempts were also made to prevent appeals direct from a State Court to the Privy Council ; to preserve the prerogative right of appeal to the Privy Council in all cases, whether constitutional or not ; and to prevent that right being cut down by the Federal Parliament ; but all these were negatived

When the draft Bill was submitted to the Colonial Office, with a view to its being introduced into the Imperial Parliament, great objection was taken by the Law Officers of the Crown to Clause 74 in which the provisions as to appeal to the Privy Council were embodied. Generally, it was urged that the restriction of the right of appeal was undesirable ; and, in particular, it was objected that there would be much difficulty in deciding what were matters “involving the public interests of any other parts of Her Majesty’s dominions,” and that the final decision in important questions as to the boundaries of Federal and State powers might seriously affect the interests of other parts of the Empire—especially those of banks and other institutions having large interests in Australia—and should therefore be left to the highest Court of the Empire, a Court free from any suspicion of local bias. On the general question of the power to limit the right of appeal, the Delegates answered that the Bill only conferred on the Commonwealth a power which was already vested in the Parliament of each of the several States. This contention was accepted as valid by the Colonial Office. On the two particular questions indicated above there was a long discussion which is fully detailed by Messrs. Quick and Garran [Annot. Const. Australian Comm., pp. 236-249]. Finally, a compromise was agreed to which left the clause in the following form :—

“Section 74.

“No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

“The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

"Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal Prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

As to the practical effect of this section, there are several points to which attention should be drawn. In the first place, it does not affect the right of appeal direct from State Courts to the Privy Council. As Professor Moore* says:—

"The jurisdiction of the High Court to entertain appeals from the State Courts [under Sec. 73, see Chapter XI.] does not extinguish the right of a litigant to appeal from the highest Court of the State to the Queen in Council; the jurisdiction of the High Court is concurrent with, not exclusive of, the jurisdiction of the Queen in Council. The restrictive provisions of Section 74 apply only where the High Court is the tribunal resorted to. The practice now well established in regard to judgments of the Supreme Courts of the Provinces in Canada is reproduced in the Commonwealth."†

But where the appeal has, as a fact, been made to the High Court, then under Sec. 73, the judgment of the High Court is final and conclusive. So that no further appeal to the Privy Council could be made as a matter of right from a judgment of the High Court acting as a Court of Appeal from a judgment of one of the State Courts; though in the ordinary case the Privy Council could still—by the exercise of the prerogative right—grant special leave to appeal from a judgment of the High Court sitting as a Court of Appeal.

But such special leave cannot be granted by the Privy Council in any case which falls under the particular terms of the first part of Sec. 74—*i.e.*, "as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, etc., etc." In such cases there can be no appeal to the Privy Council [except upon a certificate given by the High Court, as provided for in Sec. 74] from any judgment of the High Court given in the exercise either of its original or of its appellate jurisdiction.

This involves some important considerations:—

(i.) The prohibition applies only to judgments of the High Court. It does not affect judgments of the State Courts. Therefore "any judgment of the Supreme Court of a State may, even if it involves constitutional questions, be appealed from to the Privy Council direct; though if the appellant chooses to adopt the alternative of appealing to the High Court instead of to the Privy Council, there can be no further appeal to the Privy Council unless the High Court certifies that such an appeal is proper."

"The result does not appear to be altogether satisfactory. Whatever view may be taken of the expediency of retaining a right of appeal to the Privy Council in constitutional questions, it would at least seem that the Privy Council ought not to be

* "The Commonwealth of Australia," p. 252.

† As to the conditions under which there is such a right of appeal from the State Courts in Australia, see the Table given by Professor Moore in "The Commonwealth of Australia" at p. 256.

required to decide any such question without having, for its assistance, the judgment of the highest Court in Australia. As it is, the decision of *the High Court* on a certain class of constitutional questions is final, unless the High Court certifies, for special reasons, that an appeal ought to be allowed to the Privy Council; but if any such question arises *in the Supreme Court of a State*, an appeal may be had direct to the Privy Council, passing by the High Court altogether. There is thus a lack of unity in the system of interpreting the fundamental law of the Commonwealth. There is also a lack of consistency; the principle that the interpretation of the Constitution, as between Commonwealth and State, ought to rest with the Australian Courts, is affirmed by the provision which makes the decision of the High Court in such cases ordinarily final, and denied by the reservation of the full right of appeal from the State Courts to the Privy Council.”*

Messrs. Quick and Garran go on to point out that this anomaly can be remedied in two ways. As the right of appeal to the Privy Council from the Supreme Courts of the States depends on Orders in Council, the Imperial Government could, by altering those Orders, abolish the right of appeal in questions as to the limits of constitutional powers. Or—since the Federal Parliament has power under Secs. 76 and 77 to confer upon the High Court *exclusive* original jurisdiction in “cases arising under this Constitution or involving its interpretation”—the Federal Parliament could, by exercising this power, prevent State Courts from hearing such cases.

(ii.) The words “as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States” do not, as Professor Moore points out, † “exhaust possible constitutional decisions of the High Court, even in the narrowest sense of the word ‘constitutional.’ The interpretation of the Commonwealth Constitution on many points will fall without those terms. The distribution of power amongst the organs of the Commonwealth Government; the exercise of power by Commonwealth or State in excess of their respective powers, but not in derogation of the powers of the other, are illustrations. Questions of proprietary right, such as have arisen between the Dominion and the Provinces in Canada, and are not unlikely to arise in Australia, are hardly questions of ‘constitutional powers.’ ”

Appeal on Certificate.

(iii) “The power of the High Court to grant a certificate to appeal in the cases withdrawn from the prerogative power, is established by the Constitution and cannot be taken away or affected by the Parliament. It differs from the ‘leave of the Supreme Court,’ which, under the Orders in Council, is one of the conditions of ‘the appeal as of right’ from Colonial Courts, since the High Court is to certify only ‘if satisfied that for any special reason the certificate

* Quick and Garran : “Annot. Const. Australian Comm.,” p. 754.

† “Commonwealth of Australia,” p. 251.

should be granted.' The 'special reasons' which will satisfy the High Court must, of course, to a great extent be a matter of conjecture. . . . But many conceivable cases 'as to the limits *inter se*' of the constitutional powers in question might depend upon principles of common application throughout the Empire, and upon which it is eminently desirable that there should be a uniform rule declared by a common authority. Again, a case in which the High Court is divided in opinion, or in which it disagrees with a previous decision of the Court, may furnish a special reason for certifying for an appeal to the Queen in Council."*

* "The Commonwealth of Australia," p. 249.

CHAPTER XIII.

REVENUE.

In each Union of States one of the first concerns of those who are responsible for drafting the Act of Union is to secure to the Central Government an adequate revenue. In doing so, the difficulty has always been to secure the financial stability of the Governments of the several States whilst allotting sufficient revenue to the new Government that is set over them by the Constitution. Of all the Union Constitutions, that of the United States deals with the question of revenue on the broadest lines and with the fewest safeguards to the financial position of the several States. Sub-Sec. 1, Sec. 8 of Article I. of the Constitution gives Congress power "to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States," with the one limitation that "all duties, imposts and excises shall be uniform throughout the United States."* Thus "in the United States, revenue raised by Congress from customs and excise, or from any other source, is entirely at the disposal of the Federal Government, and the States are obliged to rely entirely on direct taxation to meet their own expenditure."†

United States.

Canada.

In Canada the respective powers of the Dominion and Provincial Legislatures to impose taxation for the raising of revenue are laid down by Sub-Sec. 3 of Sec. 91, and Sub-Secs. 2 and 9 of Sec. 92 of the British North America Act. Sub-Sec. 3 of Sec. 91 is one of the sub-sections detailing "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" the specific classes of subjects to which "the exclusive legislative authority of the Parliament of Canada extends." The subject enumerated in Sec. 3 is "the raising of money by any mode or system of taxation." Sub-Secs. 2 and 9 of Sec. 92, on the other hand, are two of the sub-sections enumerating the classes of subjects on which the Legislature in each Province may exclusively make laws. The subject enumerated in Sub-Sec. 2 is: "Direct taxation within the Province in order to the raising of a revenue

* *Vide* also Article I., Sec. X., Sub-sec. 2: "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports and exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress."

† *Quick and Garran*: "*Annotated Const. Australian Comm.*," p. 832.

for provincial purposes ; and that enumerated in Sub-Sec. 9 is : " Shop, saloon, tavern, auctioneer, and other licences, in order to the raising of a revenue for provincial, local, or municipal purposes."

The apparent contradiction involved in the gift of exclusive legislative power to the Dominion and Provincial Legislatures respectively by these sub-sections was adduced as an illustration in the judgment in the case of *Citizen Insurance Co. vs. Parsons*, quoted above in the chapter on the distribution of legislative power. But it has also been the subject of decision in decided cases. Thus in the case of *Dow vs. Black*,* the Privy Council reversed the judgment of the Supreme Court of New Brunswick and held that an Act of the Legislature of that Province empowering the inhabitants of a parish in the Province to raise by local taxation a subsidy to advance the construction of a railway going beyond the frontier, already authorised by Statute, was within the power of the Provincial Legislature. In the judgment of Sir J. W. Colville, the following words were used :—†

" Another question has been raised : whether there was power in the Provincial Legislature to pass an Act by which such an assessment as this could be imposed on the town of St. Stephen.

" It has been argued that, whereas the 91st section reserves to the Parliament of Canada exclusive power of legislation in respect of, amongst other subjects, " the raising of money by any mode or system of taxation," the only qualifications imposed on that general reservation are to be found in the 2nd and 9th sub-sections of Sec. 92. The latter has obviously no bearing on the present question. As to the former, it was contended that it authorises direct taxation only for the purpose of raising a revenue for general Provincial purposes, that is, taxation incident on the whole Province for the general purposes of the whole Province. Their Lordships see no reason for giving so limited a construction to this clause of the Statute. They think it must be taken to enable the Provincial Legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the Province. They conceive that Sub-Sec. 3 of Sec. 91 is to be reconciled with Sub-Sec. 2 of Sec. 92 by treating the former as empowering the supreme Legislature to raise revenue by any mode of taxation, whether direct or indirect ; and the latter as confining the Provincial Legislature to direct taxation within the Province for Provincial purposes."

This judgment has been upheld, and its principle applied, in several subsequent cases. Thus, in what are known as the "*Lambe cases*,"‡ where " the Quebec Legislature had taxed every bank, insurance company and incorporated company . . . in the Province of Quebec, banks paying a tax on the paid-up capital and an additional sum for each place of business, whilst insurance companies were taxed in a sum specified in the Act ; the Judicial Committee [of the Privy Council] held that this Act was within the power of Sub-Sec. 2, Sec. 92, and was *intra vires*."§

* [44 L.J.P.C. 52]

† Quoted from *Wheeler* : "*Confed. Law of Canada*," p. 67.

‡ 12 *App. Cases*, 575.

§ *Wheeler* : "*Confed. Law of Canada*," p. 68. And *vide* the elaborate discussion on Sub-Secs. 2 and 9 of Sec. 92 given by *Wheeler* at pages 113-122 and pages 126-224 respectively. *Vide* also *Lefroy* : "*Legislative Power in Canada*," on the whole question.

Australia.

The Revenue Clauses of the Australian Constitution are of such an elaborate nature that—constituting as they do a new experiment in the legislation of union—they demand detailed description, and offer, in the course of that description, ample opportunity of discussing the American and Canadian Constitutions wherever they have corresponding provisions. In the first place, then, the Australian Constitution follows that of Canada in establishing [Sec. 81] a Consolidated Revenue Fund. In Canada this is formed out of all the duties and revenues over which the States which are parties to the Union had the power of appropriation “except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act” [Sec. 102, B.N.A. Act]. In Australia the Consolidated Revenue Fund consists of “all revenues or moneys raised or received by the Executive Government of the Commonwealth” [Sec. 81]. In both Canada and Australia the costs, charges, and expenses incidental to the collection, management and receipt of the Consolidated Revenue Fund form the first charge upon it; and in both, as in the United States, appropriation by Parliament is a necessary preliminary to the payment of any money from the Fund by the Treasury.

It is, however, in its dispositions for the collection and distribution of the revenue of the Commonwealth and the States that the Australian Constitution makes so daring an advance upon all prior Union Constitutions. Thus Sec. 86 gives “the collection and control of duties of customs and excise and the control of the payment of bounties” to the Commonwealth immediately upon its establishment; whilst Sec. 88 lays upon the Federal Parliament the duty of imposing uniform duties of customs within two years of that establishment; and upon the provisions of Sec. 88 being carried out, Sec. 90 comes into operation and makes the power of the Federal Parliament “to impose duties of customs and excise and to grant bounties on the production or export of goods” an exclusive power. That is to say, as Sec. 90 goes on to explain, that all laws of the several States imposing such duties or offering such bounties cease to have any effect, with the exception of grants of or agreements for bounties made before 30th June, 1898. To this exception Sec. 91 adds the further exceptions that:

“Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver or other metals; nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.”

Customs and Excise.

The effect of these provisions of the Australian Constitution is to place the whole revenue of the Commonwealth from customs and excise in the hands of the Federal Government. Duties of customs include all duties imposed by law on the importation or exportation of articles. As to the meaning of “duties of excise” in the Australian Constitution, Messrs. Quick and Garran point out [Ann. Const. Aust. Comm., p. 837] that in England:

"The list of Excise licences, which at first included only brewers, beer-dealers, beer-retailers, distillers, spirit-dealers, spirit-retailers, tobacco and snuff manufacturers and dealers, wine-dealers and wine-retailers, was expanded by English usage until it embraced auctioneers, owners of armorial bearings dogs and game, gun-dealers, persons entitled to carry guns, hawkers, house-agents, patent medicine-sellers, owners of carriages, pawnbrokers, plate-dealers, refiners of gold and silver, refreshment-house-keepers, and carriers."

As far as Australia is concerned, however, they are of opinion that :—

"The fundamental conception of the term [Excise] is that of a tax on articles produced or manufactured in the country. In the taxation of such articles of luxury as spirits, beer, tobacco and cigars, it has been the practice to place a certain duty on the importation of these articles and a corresponding or reduced duty on similar articles produced or manufactured in the country ; and this is the sense in which Excise duties have been understood in the Australian Colonies, and in which the expression was intended to be used in the Constitution of the Commonwealth."

The point, however, that must be noted is that the placing of the whole revenue derived from customs and excise in the hands of the Federal Government gives that Government a far larger annual income than is required for its purpose. This point has been commented upon in the chapter on "the growth of the Australian Commonwealth," in which a sketch of the debates of the Conventions upon this matter has been given.

The solution finally embodied in the Constitution has two sides. In the first place, Sec. 87 embodies a guarantee against over-expenditure on the part of the Commonwealth Government. Known as the "Braddon Clause," it provides that :—

"During a period of ten years after the establishment of the Commonwealth, and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of Customs and Excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

"The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth."

In considering the effect of this section, it must be noted that the operation of the "Braddon Clause" is limited to ten years, and thereafter can be altered by the Federal Parliament ; that it applies only to "net revenue from duties of customs and of excise"—*i.e.*, not to revenue from other sources and to revenue from those sources only when the expenses of collection have been paid ; and that the "one-fourth" which the Commonwealth is empowered to spend is one-fourth of the total net revenue, not one-fourth of the net revenue collected in each State. The last point is one that appears to have been misunderstood at the time when the Constitution passed the electors. At any rate, it has been a grievance, on the part of Queensland at least, that she has had to contribute more than one-fourth of the net revenue from customs and excise collected within her borders ; and it has been pointed out that the operation of the Clause as it stands may be very unfair to some States as compared with others ; whereas it was the impression, at the time when the Constitution was before the

electors, that no State could be asked to contribute to the Federal revenue more than one-fourth of her own net revenue from customs and excise. Finally, the last sentence of the "Braddon Clause" has not yet come into operation, as it has been found impossible to devise a workable scheme for the taking over of the debts of the several States by the Commonwealth.

Not only does the "Braddon Clause," as embodied in Sec. 87 of the Constitution, provide a guarantee against over-expenditure of Federal revenue from customs and excise, but it also enacts that "the balance shall, in accordance with this Constitution, be paid to the several States." The sections of the Constitution referring to the distribution of surplus revenue from customs and excise among the several States, are Secs. 89, 93 and 94. They embody the other side of the solution of the question of the disposal of the revenue of the Commonwealth. The method adopted is to make a distinction—as far as giving credit for revenue collected within the boundaries of any given State—between the period prior to, and the period for five years subsequent to the imposition of uniform duties of customs and excise which is made obligatory by Sec. 88. Thus Sec. 89 says that :—

"Until the imposition of uniform duties of Customs—

- (1) "The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth."

Whereas Sec. 93 says that :—

"During the first five years after the imposition of uniform duties of Customs

- (1) "The duties of Customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of Excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected, not in the former, but in the latter State."

That is to say that for the period prior to the imposition of a uniform customs tariff, the Commonwealth was to credit the revenue collected from Customs and Excise to the State in which it was *collected*, irrespective of the place where the dutiable goods were to be consumed ; whereas for five years after the imposition of the uniform tariff the State in which dutiable goods were to be *consumed* was to be credited with the revenue accruing from the duties on such goods, irrespective of the place where the duties might happen to be collected. The reason for this difference is that upon the imposition of a uniform customs tariff, Sec. 92 of the Constitution brings automatically into operation a system of absolute free trade between the several States of the Commonwealth and abolishes the old system of customs collection upon the borders of each State. Perhaps it is not going beyond the legitimate province of this work to emphasise the fact that in Australia the abolition of customs-houses on the borders of each State, the establishment of absolute inter-State free trade, and the imposition of a uniform Customs tariff for the whole of Australia, were all the results of the creation of the Commonwealth. In South Africa they are already secured so long as the Customs Union endures.

So much for the provisions of the Australian Constitution as far as the credit to be given to each State for Federal revenue actually collected is concerned. When that revenue reaches the hands of the Federal Treasurer he has first to deduct from it the cost of collection in order to arrive at the 'net revenue' mentioned by Sec. 87. He then has to ascertain how much of that net revenue is to be credited and debited to each State. The method of arriving at the credit of each State is different, as we have already shown, now that a uniform customs tariff has been imposed, from what it was before that uniform tariff took effect. In the method, however, of debiting Federal expenditure there is no difference between the two periods. Thus Sub-Sec. 2 of Sec. 89 says that :—

"The Commonwealth shall debit to each State :

- (a) "The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any Department transferred from the State to the Commonwealth ;
- (b) "The proportion of the State according to the number of its people, in the other expenditure of the Commonwealth."

And Sub-Sec. 3 of the same Section provides that :—

"The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State."

These two Sub-Sections are also applied to the period for five years after the imposition of a uniform customs tariff by Sub-Sec. 2 of Sec. 93. And the whole question of the distribution of surplus revenue among the several States, after the expiration of the period of five years from the imposition of the uniform customs tariff, is left by Secs. 93 and 94 of the Constitution to the discretion of the Federal Parliament.*

It has already been pointed out that *the first part of* Sec. 92 of the Australian Constitution enacts that :—

"On the imposition of uniform duties of Customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

Inter-Colonial
Free Trade.
Australia.

This provision is limited in four ways :

I. The second part of Sec. 92 provides that :—

"Notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of Customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation."

[The object of this provision was to prevent merchants, before the imposition of the uniform tariff, "loading up" imported goods in a Colony where duties were light, so that when the uniform tariff, with inter-Colonial free trade, came into force, they might re-export the goods to other Colonies in Australia where the import duties were higher.]

* *Vide* also Sec. 95 :—"During a period of ten years after the establishment of the Commonwealth, and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

II. Sec. 95 makes a special provision for Western Australia, giving the Parliament of that State power, during the first five years after the imposition of the uniform tariff, to impose special duties on goods imported into that State. The rate at which the special duty may be imposed is limited by a declining scale, and a similar duty must be imposed on goods imported from abroad, where the special West Australian duty is lower than that charged by the Commonwealth tariff on such imported goods.

[This provision was specially inserted in view of the fact that Western Australia, "with her large unsettled mining population and her resources in other directions comparatively undeveloped, was compelled to rely more largely than any other Colony on her Customs revenue, and direct taxation to any large extent was out of the question." The special power ceases altogether five years after the imposition of the uniform tariff.]

III. Sec. 113 says that :—

"All fermented, distilled, or other intoxicating liquids passing into any State, or remaining therein for use, consumption, sale or storage, shall be subject to the laws of the State, as if such liquids had been produced in the State."

IV. The second part of Sec. 90—whilst providing that "on the imposition of uniform duties of Customs all laws of the several States imposing duties of Customs or Excise, or offering bounties on the production or export of goods shall cease to have effect"—goes on to provide that :—

"Any grant of, or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good, if made before the 30th day of June, 1898, and not otherwise."*

The provisions of Sec. 90 of the Australian Constitution giving exclusive power to the Federal Government to impose duties of Customs and Excise and to grant bounties, and those of Sec. 92 providing for absolute inter-Colonial free trade, may be compared with the corresponding provisions of the Constitutions of the United States and Canada as follows :—

I. THE UNITED STATES :

The power of Congress [under Article I., Sec. 8., Sub-Sec. 1 of the Constitution, already mentioned at the beginning of this chapter] "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States" has its corollary in Article I., Sec. 10, Sub-Sec. 2, which provides that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."†

There is no provision in the Constitution of the United States securing freedom of trade within the Union. But the Courts, in interpreting the powers given to Congress "to regulate commerce with foreign nations, and among the several States, and with the

* And *vide* also the provisions of Sec. 92.

† This provision is copied in Sec. 112 of the Australian Act.

Indian tribes" [Article I., Sec. 8, Sub-Sec. 3] have laid it down that the whole subject of commercial regulation is *exclusively* in the power of Congress and is prohibited to the several States. This principle was established by Chief Justice Marshall in a famous judgment upon the facts brought before the Supreme Court in the case of *Gibbons vs. Ogden* [G. Wheaton's Rep., pp. 198-202]. Commenting upon the far-reaching effect of this case. Story* defines the power to regulate commerce as including both traffic and foreign and domestic intercourse. He points out that :—

"The importance of regulating commerce among the States, for the purposes of the Union, is scarcely less than that of regulating it with foreign States. A very material object of this power is the relief of the States, which import and export through other States, from the levy of improper contributions on them by the latter; If each State were at liberty to regulate the trade between State and State, it is easy to foresee that ways would be found out to load the articles of import and export, during their passage through the jurisdiction, with duties which should fall on the makers of the latter and the consumers of the former. The experience of the American States during the Confederation† abundantly establishes that such arrangements could be and would be made under the stimulating influence of local interests and the desire of undue gain. Instead of acting as a nation in regard to foreign powers, the States individually commenced a system of restraint upon each other, whereby the interests of foreign powers were promoted at their expense. When one State imposed high duties on the goods or vessels of a foreign power to countervail the regulations of such powers, the next adjoining States imposed lighter duties to invite those articles into their ports, that they might be transferred thence into the other States, securing the duties to themselves. This contracted policy in some of the States was soon counteracted by others. Restraints were immediately laid on such commerce by the suffering States; and thus a state of affairs disorderly and unnatural grew up, the necessary tendency of which was to destroy the Union itself."

Story then goes on to discuss the nature of the power to regulate commerce :—

"The next inquiry is whether this power to regulate commerce is exclusive of the same power in the States or is concurrent with it. It has been settled upon the most solemn deliberation, that the power is exclusive in the government of the United States. The reasoning upon which this doctrine is founded is to the following effect. The power to regulate commerce is general and unlimited in its terms. The full power to regulate a particular subject implies the whole power and leaves no *residuum*. A grant of the whole is incompatible with the existence of a right in another to any part of it."

Further, there is a distinction between the nature of the power to regulate commerce and that of the power to lay taxes :—

"The power to regulate commerce is not at all like that to lay taxes. The latter may well be concurrent, while the former is exclusive, resulting from the different nature of the two powers. The power of Congress, in laying taxes, is not necessarily or naturally inconsistent with that of the States. Each may lay a tax on the same property, without interfering with the action of the other; for taxation is but taking small portions from the mass of property, which is susceptible of almost infinite division. In imposing taxes for State purposes, a State is not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each Government exercises the power of taxation, neither is exercising the power of the other.

* Commentaries on the Const. U.S., Secs. 1,056-1,073.

† I.E.—The Union of the American Colonies against England, which carried through the rebellion and was merged in the later Federation

But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power which is granted to Congress and is doing the very thing which Congress is authorised to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

Story's opinion that the power to regulate commerce between the several States of the Union is *exclusive* in Congress must be taken as subject to the effect of cases decided by the Courts of the United States subsequent to the date of publication of his Commentaries. He carried his opinion so far as to maintain that the exclusive power of Congress in this respect operated as a prohibition to all State legislation on the subject, not only in cases where Congress had actually exercised its power of legislation, but even in cases where there had been no such exercise of that power by Congress. This doctrine, if supported, would have had the effect of totally invalidating all legislation by the State Legislatures which could be regarded as aiming in any way at the "regulation of commerce." Sitting as one of the Judges in the case of "*The City of New York vs. Miln*" [11 Peter's Sup. Ct. Rep., p. 102], Story maintained this doctrine in a judgment of great force, but was over-ruled by the majority of the Judges in that case. The ultimate decision of a matter which was in constant conflict in the Courts of the United States for a period of fifty years is to be found in the judgment of the United States Court in the case of *Cooley vs. Port Wardens* [12 How., p. 319]. The effect of that judgment is stated by Messrs. Prentice and Egan ["The Commerce Clause," pp. 27-29] as follows:—

"The States may establish port regulations, regulations of pilotage, may improve their harbours and rivers, erect bridges and dams, and exercise many other local powers. In the exercise of its proper authority, a State may enact laws providing for the inspection of goods, to determine whether they are fit for commerce, and to protect the citizen and the market from fraud. But in all such cases, as was said in *Leisy vs. Hardin*, though the States may exercise powers which may be said to partake of the nature of the power granted to the general Government, they are strictly not such, but are merely local powers, which have full operation until circumscribed by the action of Congress in effectuation of the general power. In matters admitting uniform regulation throughout the country and affecting all the States, the inaction of Congress is to be taken as a declaration of its will that commerce shall be 'free and unrestricted,' so far only as concerns any general regulation by the States. It can hardly be considered that this phrase means more than freedom from such regulations as admit of uniformity, for it is only to this extent that the jurisdiction of Congress over inter-State commerce is exclusive of State regulation. On the other hand in matters of local nature, such as are auxiliary to commerce rather than a part of it, the inaction of Congress is to be taken as an indication that, for the time being and until it sees fit to act, they may be regulated by State authority."*

Such is the effect of the judgment in *Cooley vs. Port Wardens*, the material portion of which may—in view of its great importance—be quoted here:—

"The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the

* Quoted: Annot. Const. Australian Comm., p. 530.

nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assent concerning all of them what is really applicable but to a part."*

To return more particularly to the subject of freedom of trade between the several States of the United States, it may be said that that freedom has been sufficiently secured by the interpretation placed by the Courts on the power of Congress to regulate commerce. The several States have tried to limit this freedom of trade in many ways, which are thus classified by Messrs. Quick and Garran :—†

(1) *By the imposition of taxes on imported goods, after their entry into the State.*

The United States Courts have very frequently had to restrain such attempts by the several States to limit the freedom of trade, made under cover of their right to tax all property within their jurisdiction. The following are instances of State laws—passed with this object—which have been held to be unconstitutional :—

A tax on goods coming from other States, unaccompanied by equal taxes on similar local goods; a tax on the earnings of carriers conveying freight and passengers from one State to another; a tax on persons selling goods manufactured outside the taxing State when no similar tax was exacted from goods of a like nature manufactured in that State; a tax on all non-residents who sold liquors; a tax on every ton of freight carried by a railway in and through a State; a tax on all vessels touching the wharves of a State, in so far as it applied to vessels engaged in inter-State business, etc., etc.

(2) *By requiring Persons engaged in selling goods introduced or coming from another State to pay for licences to sell.*

The following are instances of such State laws declared unconstitutional :—

Requiring commercial travellers canvassing, by sample, for the sale of goods at the time outside the State to hold a licence; requiring persons selling goods not the product or manufacture of the vendors to hold a licence; requiring the officers of foreign corporations engaged in inter-State commerce to hold a licence; requiring a telegraph company established by the Federal Legislature to hold a licence, etc., etc.

* Quoted: Annot. Const. Australian Comm., p. 530.

† Annot. Const. Australian Comm., pp. 846–854.

(3) *By restricting the actual introduction of goods from another State, on alleged sanitary or moral grounds, this being done in the pretended exercise of the police power of the State.*

Instances of pretended exercise of their police powers by the several States are frequent. But the difficulty of the Court has always been to distinguish between laws passed under a genuine and a pretended exercise of such powers.

The vital test applied by the Court in all these cases of the claim of the several States to exercise their powers of taxation or police regulation over persons within their jurisdiction, in order to determine whether the exercise of those powers is constitutional or not, has been whether the laws to be adjudicated upon make any discrimination between the inhabitants of the State which has passed such a law and those of other States. If there is such discrimination, then, as a general rule, such laws are held to be unconstitutional.

“The problem”—[say Messrs. Quick and Garran]*—“which caused such a long controversy in the Supreme Court of the United States, as to whether the power over commerce was exclusive or concurrent, or partly exclusive and partly concurrent, should never arise or occasion any trouble in the interpretation of the Constitution of the [Australian] Commonwealth, in which two principles are clearly and unmistakably established; that on and after the imposition of uniform duties of customs, the power of the Federal Parliament to impose duties of customs and excise, and to grant bounties, becomes absolutely and irrevocably exclusive and this is the limit of its exclusive power; that, as to other matters relating to commerce, the States will continue to exercise concurrent authority and the State laws in respect to such matters will be perfectly valid, until laws inconsistent therewith are passed by the Federal Parliament.”

II. CANADA :

The relative powers of taxation reposed by the British North America Act in the Dominion and Provincial Parliaments respectively have already been baldly discussed at the beginning of this chapter.

The sections of that Act in respect to freedom of Inter-State trade require no comment. They are :—

Sec. 121. All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Sec. 122. The Customs and Excise Laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada.

* Annot. Const. Australian Comm., p. 530.

Sec. 123. Where Customs duties are, at the Union, leviable on any goods, wares, or merchandises in any two Provinces, those goods, wares and merchandises may, from and after the Union, be imported from one of those Provinces into the other of them, on proof of payment of the Customs duty leviable thereon in the Province of exportation, and on payment of such further amount (if any) of Customs duty as is leviable thereon in the Province of importation.

Sec. 124. Nothing in this Act shall affect the right of New Brunswick to levy the lumber dues provided in chapter fifteen of title three of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the amount of such dues; but the lumber of any of the Provinces other than New Brunswick shall not be subject to such dues.

The revenue provisions of the Swiss Federal Constitution are contained in Switzerland. Articles 28 to 32. They require no comment.

CHAPTER XIV.

RAILWAYS.

United States.

The question of the right of the Central Government in a Union of States to regulate railways in the territory of the several States of the Union—whether they belong to the State Government or are owned privately—is one which has occasioned a great deal of controversy.

In the Constitution of the United States there is, of course, no definite provision as to this question of railways; but it has been held—by an extensive interpretation of Sub-sec. 3, Sec. 8, Article I., which gives Congress power to regulate commerce among the several States—that the Central Legislature has power to provide for the regulation of railways in the several States. Thus in the case of *Railroad Co. vs. Huson* [95, U.S. Supreme Ct. Rep., p. 465] Mr. Justice Strong said that “neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. Many acts of a State may indeed affect commerce, without amounting to a regulation of it, in the constitutional sense of the term While we unhesitatingly admit that a State may pass laws for the protection of life, liberty, health or property within its borders it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection.” And it is now admitted that Congress has plenary powers to regulate the rates of inter-State and foreign commerce.*

Inter-State
Commission.
United States.

“The Constitution of the United States” [say Messrs. Quick and Garran†] “contains no clause authorising Congress to appoint an Inter-State Commerce Commission; but such a Commission has been authorised and appointed under and by virtue of the power vested in Congress to regulate commerce. This is a striking illustration of the vastness and elasticity of the commerce power. The first Inter-State Commerce Act was passed on 4th February, 1887; it was amended on 2nd March, 1889; again amended on 10th February, 1891; and finally on 11th February, 1893. The

* *Covington and Cincinnati Bridge Co. vs. Kentucky* (154, U.S., 204). *New York Board of Trade vs. Pennsylvania Ry. Co.* (3, Inter-State Commission Rep., 417). *Kauffman Milling Co. vs. Missouri Pacific Railroad Co.* (3, Inter-State Comm. Rep., 400].

† Annot. Const. Australian Comm., p. 521.

general outlines of this legislation and the principles deducible therefrom will be found discussed in *Inter-State Comm. vs. Baltimore and Ohio Railroad Co.*, 1892, 145 U.S., 263; *Inter-State Comm. vs. Brimson*, 1894, 154 U.S., 447; *Inter-State Comm. vs. Alabama Midland Railway Co.*, 1896, 5 Inter-State Comm. Rep., 685, and 1897, 168 U.S., 144."

The idea of the Inter-State Commission thus established in the Great Britain. United States was borrowed from England. There, as far back as 1840, powers were given to the Board of Trade with regard to the superintendence of railways. By subsequent legislation these powers were more specifically defined in their application to "undue preferences" and the with-holding of "reasonable facilities" for through traffic; and were transferred to Railway Commissioners, who were themselves replaced in 1888 by the Railway and Canal Commission with greatly enlarged jurisdiction and the power to award damages and without any appeal from its decision on any question of fact or *locus standi*.

In the United States, the Act establishing the Inter-State Commerce Commission gives the Commission power "to inquire into the management of the business of 'all common-carriers subject to the provisions of this Act' [*i.e.*, all common-carriers engaged in inter-State or foreign commerce], to keep itself informed as to the manner and method in which such business is conducted, and to obtain from such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created. The Commission is further authorised to require the attendance of witnesses and the production of documents and to invoke the aid of the Federal Courts in case of disobedience to its summons. Sec. 13 provides that any person complaining of any act done by a carrier in contravention of the Act may apply to the Commission by petition. The Commission is then to call upon the carrier to satisfy the complaint or answer it. If the carrier does not satisfy the complaint, or if there appears to be reasonable ground for investigating the matters complained of, it is the duty of the Commission to investigate them. The Commission may also investigate any complaint forwarded by the Railroad Commission of any State, or may institute any inquiry on its own motion. United States.

"It is the duty of the Commission to make reports of all investigations, including the findings of fact on which its conclusions are based, and its recommendations, if any, as to what reparation should be made by the carrier to any persons injured; and such findings are in all judicial proceedings *prima-facie* evidence as to the facts found. If the Commission is satisfied that any carrier has violated the Act, or that any party has sustained injury by such violation, it must forward to the carrier a copy of its report, with a notice to desist from such violation, or to make reparation, or both [Sec. 15]. If a common-carrier violates or disobeys any order of the Commission it is the duty of the Commission, and lawful for any person interested, to apply in a summary way, by petition,

to the proper Circuit Court, alleging such violation or disobedience ; and the Court must hear and determine the matter speedily, as a Court of Equity, but without formal pleadings or proceedings, and in such manner as to do justice, and may restrain the carrier by injunction or other process, mandatory or otherwise, and may enforce such process by attachment or fine, and may order the payment of costs. When the subject in dispute is of the value of 2,000 dollars or more, either party may appeal to the Supreme Court [Sec. 16]."*

[*Vide*, on the whole subject : *Hadley*, "Railroad Transportation." *Prentice and Egan*, "The Commerce Clause."]

Australia.

The fact that in the Australian Federal Constitution the American system of railway regulation has been copied to a large extent, makes it convenient to discuss here the provisions of that Constitution on this point. It should be remembered that, whereas in Great Britain and to a large extent in the United States the railways are the property of private companies, in Australia they are almost wholly owned by the several States.

The difficulties attending the regulation of Railways in Australia are discussed in Part I., Chapter II., of this book. The problem—as it finds expression in the Federal Constitution—falls under two heads :—

(i.) *Extent of Federal Control over State Railways :*

This is expressed in several sections. Thus Sec. 51 gives the Federal Parliament power, subject to the Constitution, to make laws for the peace, order and good government of the Commonwealth with respect to :—

Sub-Sec. xxxii.: "The control of railways with respect to transport for the naval and military purposes of the Commonwealth."

Sub-Sec. xxxiii.: "The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State."

Sub-Sec. xxxiv.: "Railway construction and extension in any State with the consent of that State."

And under Sec. 98 :—

"The power of the Parliament to make laws with respect to trade and commerce extends to railways the property of any State,"

thus crystallising into a definite constitutional provision that power of the Central Government which in the United States has been established by judicial interpretation of the Constitution.

Whilst under Sec. 99 it is provided that :—

"The Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or any part thereof."

thus adopting, almost verbatim, Article I., Sec. 9, Sub-Sec. 6, of the United States Constitution, which says that :—

"No preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another."

* Annot. Const. Australian Comm., p. 897.

(ii.) The Exercise of Federal Control :

It is at once clear that the power of the Federal Parliament to control State railways in Australia—as defined above—inevitably involves both the question as to how that power is to be exercised and that as to the extent to which it can be put into force. The word “preference,” for instance, in Sec. 99, is one which demands close definition with special reference to the problems of State railway management in Australia—problems which are briefly noticed in the second chapter of Part I. of this book. The solution of the first question is to be found in Secs. 101 and 103 of the Australian Constitution ; that of the second question in Secs. 102 and 104. Secs. 101 and 103 are as follows :—

Sec. 101. “There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce and of all laws made thereunder.”

Sec. 103. “The members of the Inter-State Commission :—

- (i.) “Shall be appointed by the Governor-General in Council ;
- (ii.) “Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity ;
- (iii.) “Shall receive such remuneration as the Parliament may fix ; but such remuneration shall not be diminished during their continuance in office.”

And Secs. 102 and 104 define the limits of the points to be decided by the Commission. Thus :—

Sec. 102. “The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State ; due regard being had to the financial responsibilities incurred by any State in connection with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.”

Sec. 104. “Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of a State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.”

Finally, Sub-Sec. 3 of Sec. 73 gives a right of appeal to the High Court from an order or decree of the Inter-State Commission, “as to questions of law only.”

It is not within the province of this work [as explained in the Introduction] to discuss the working of the Inter-State Commission thus established by the Australian Federal Constitution. But the following quotation from Professor Moore’s “Commonwealth of Australia” expresses briefly and clearly the essential difference between its duties and those of similar bodies in Great Britain and the United States :—

"The questions that have arisen in the past as to railways in Australia, and therefore presumably the class of case with which the Commission will be mainly concerned, are singularly different from the typical preference and discrimination cases in England and America. Speaking generally, it may be said that the problem in England and America has been how to protect the trader and the passenger against various kinds of oppression by the Railway Companies, and to discourage combination and to encourage competition. In Australia, the question has been rather how to reconcile the interests of the railway proprietors—the Governments—each of which has deemed itself entitled to a monopoly of certain traffic. It is only fair to add that cases of favour or oppression of individuals, which account for much of English and American legislation, have been conspicuously absent in Australia. Favour of localities, however, is not unknown. The anxiety of New South Wales and Victoria has been to bring the trade to their respective capitals as much as to secure traffic for their railways."

Canada.

In Canada the difficulties that have arisen since Union as to the Dominion control of railways have been of a different nature to those of the United States and Australia. Though the British North America Act follows the Constitution of the United States in giving the Dominion Parliament power to legislate—to the exclusion of the Provincial Legislatures—on "the regulation of trade and commerce" [Sec. 91 (2)], the Courts which have had to interpret that Act have not been compelled, as the American Court has been, to read into this clause a power of central control over railways. For the Act itself expressly provides for the apportionment of railway control between the Dominion and the Provincial Legislatures. Thus Sec. 92, Sub-Sec. 10, gives the Provincial Legislatures exclusive power to legislate as to—

"Local works and undertakings other than such as are of the following classes :

- (a) "Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province."
- (c) "Such works as, although wholly situated within the Province, are before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

Considerable difficulty has arisen in the interpretation of this section. There have been many cases in which Provincial Legislatures have passed Acts granting concessions, etc., to Railway Companies, only to find themselves involved in disputes with the Dominion Government on the ground that they have invaded the provisions of one of the two exceptions to their power of legislation in railway matters which are quoted above; and to have their Acts declared unconstitutional by the Privy Council. Such has

been the result of the attempt of those who framed the British North America Act to avoid the pitfalls of the American Constitution as far as the regulation of railway matters was concerned.*

In Switzerland, Article 26 of the Constitution says that :—

Switzerland.

"Legislation pertaining to the construction and management of railways is an affair of the Union."

Previous to the adoption of this Constitution in 1874, the question of railway development had been for a considerable period the outstanding issue of Swiss politics—one party contending for State, and the other for private, ownership. The latter prevailed; and, with the building of the line over the St. Gothard Pass about 1863, the railway question passed out of the domain of politics. [*Vide* : Lowell, "Governments and Parties in Continental Europe," vol. II., p. 303.]

Adams ["The Swiss Confederation," p. 33] gives an interesting sketch of the manner in which the development of the railway system in Switzerland is carried out under the Constitution of 1874. When the Federal Executive is asked for a railway concession of any kind, it consults the Cantons concerned, "and negotiations take place later between Cantonal representatives and the person or persons demanding the concession, under the presidency of a delegation of the Federal Council [*i.e.*, the Executive], including the head of the particular department." When the conditions have been fixed, the Federal Executive sends a report to the Federal Assembly, with its recommendation. The Federal Assembly has the right of final decision and can grant a concession even if a Canton opposes it.

The provisions of the Federal Constitution of Germany as to the power of the Central Government over the construction and management of railways are very remarkable, and express the conviction of those who framed the Constitution as to the strategic importance of railways from a military point of view. Article 8 of the Constitution gives the Federal Council—on which Prussia has seventeen representatives—power to appoint from its own members a Permanent Committee on railroads, posts and telegraphs; whilst under Sub-Sec. 8 of Article 4, railway matters are expressly placed "under the supervision and legislative control of the Empire." The special provisions of the Constitution as to railways are contained in Articles 41 to 47, which are as follows :—

* *Vide*, for a discussion of the whole matter, *Wheeler*, "Confed. Law of Canada," pp. 225-234; and especially *Dow vs. Black* [L.R. 6, P.C. 272]; *European and North American Ry. Co. vs. Thomas* [14, S.C.N.B., 42]; *Bourgois vs. La Compagnie de Chemin de fer de Montreal, etc.* [5, P.C. App. Cas., 381].

Article 41. Railways, which are considered necessary for the defence of Germany, or in the interest of general commerce, may by Imperial law be constructed at the cost of the Empire, even in opposition to the will of those members of the Union through whose territory the railroads run, without prejudice, however, to the sovereign rights of that country; or private persons may be charged with their construction, and receive rights of expropriation.

Every existing railway company is bound to permit new railroad lines to be connected with it, at the expense of the latter.

All laws granting existing railway companies the right of injunction against the building of parallel or competitive lines are hereby abolished throughout the Empire, without detriment to rights already acquired. Such rights of injunction cannot be granted in concessions to be given hereafter.

Article 42. The Governments of the Federal States bind themselves in the interest of general commerce, to have the German railways managed as one system, and for this purpose to have all new lines constructed and equipped according to a uniform plan.

Article 43. Accordingly, as soon as possible, uniform arrangements as to management shall be made, and especially shall uniform regulations be adopted for the police of the railroads. The Empire shall take care that the various railway administrations keep the roads always in such condition as is required for public security, and that they be equipped with such rolling stock as the wants of trade demand.

Article 44. Railway companies are bound to run as many passenger trains of suitable velocity as may be required for through traffic, and for the establishment of harmony between time-tables; also to make provision for such freight trains as may be necessary for the wants of trade, and to organise a system of through booking both in passenger and freight traffic, permitting the trains to go from one road to the other for the usual remuneration.

Article 45. The Empire shall have control over the tariff of charges. It shall endeavour to cause—

1. Uniform regulations to be speedily introduced on all German railway lines.

2. The tariff to be reduced and made uniform as far as possible, and particularly to secure low long-distance rates for the transport of coal, coke, wood, minerals, stone, salt, crude iron, manure, and similar articles, as demanded by the interests of agriculture and industry. It shall endeavour in the first instance to introduce a one pfennig tariff as soon as practicable.

Article 46. In case of public distress, especially in case of an extraordinary rise in the price of provisions, it shall be the duty of the railway companies to adopt temporarily a low special tariff suited to the circumstances, which shall be fixed by the Emperor, on motion of the competent committee of the Federal Council, for the forwarding of grain, flour, vegetables and potatoes. This tariff shall, however, not be less than the lowest rate for raw produce existing on the said line.

The foregoing provisions, and those of Articles 42 to 45, shall not apply to Bavaria.

The Imperial Government, however, has the power, with regard to Bavaria also, to prescribe by means of legislation uniform rules for the construction and equipment of such railways as may be of importance for the defence of the country.

Article 47. The managers of all railways shall be required to obey, without hesitation, requisitions made by the authorities of the Empire for the use of their roads for the defence of Germany. In particular shall troops, and all material of war, be forwarded at uniform reduced rates.

CHAPTER XV.

THE STATES.

We have now dealt with the most prominent features of the Central Government in a Union of States. In this chapter, we shall attempt to indicate the provisions made by such Unions for the local or State Governments.

The subject is one which has a very wide scope, and no attempt has been made to compile an exhaustive account of all the rules for local government laid down by any given Union Constitution. All that has been done is to take certain specific points of importance and to summarise as shortly as possible the provisions of the American, Canadian, Swiss and Australian Constitutions, in so far as they deal with those points, indicating their practical results where it seemed necessary to do so. The legislative and taxing powers of the local Governments have been dealt with incidentally in the chapters on "Distribution of Legislative Power" and "Revenue"; and it has not been thought necessary to go into those powers in more detail in this chapter. Nor has it been possible to deal with State Judicatures in the space available.

I. CONSTITUTION.

The relation of the Union Constitution to that of the States Canada. is one of the points in which the Canadian Constitution differs from the ordinary type of Union Act. This is due to the fact that, with the taking effect of the British North America Act, the two Provinces of United Canada became separated from each other. Thus, whereas the Act—as far as Nova Scotia and New Brunswick Nova Scotia and New Brunswick. were concerned—merely provided [Sec. 88] that their respective Constitutions should, subject to the provisions of the Act, continue as they existed at the Union until altered under the authority of the Act; a new Constitution was provided by the Act itself for the Legislatures of Ontario and Quebec, based on the Act passed by the Legislature of United Canada to which reference has been made in the chapter on "the Creation of the Canadian Dominion." Under this Constitution, Ontario was given a Legislature to consist of a Lieutenant-Governor and a single House of eighty-two members, to be called the Legislative Assembly of Ontario [Secs. 69, 70]. In Quebec the Legislature was to consist of the Lieutenant-Governor and two Houses—a Legislative Council of twenty-four members nominated by the Lieutenant-Governor, and a Legislative Assembly of sixty-five members "to be elected to represent the sixty-five electoral divisions or districts of Lower Canada [Quebec] in this Act referred to, subject to alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present

to the Lieutenant-Governor of Quebec for assent any Bill for altering the limits of any of the electoral divisions or districts, and the assent shall not be given to such Bill unless an address has been presented by the Legislative Assembly to the Lieutenant-Governor stating that it has been so passed." [Secs. 71, 72, 80.] Definite provision was also made for filling up vacancies in the Legislative Council; for determining questions as to the qualification of members of the Legislative Council; for the appointment and removal of its Speaker by the Lieutenant-Governor; and for a quorum of its members and the decision of matters brought before it by a majority of votes, the Speaker having both an ordinary and a casting vote. [Secs. 73-79.]

The Act then went on to deal with matters common to the Legislatures of both Ontario and Quebec. Provision was made for calling them together not later than six months after the Union and thereafter from time to time, not less than once in every year: Persons [other than Ministers] holding an office of profit under the Province were disqualified for membership of its Legislature: Laws in force in the two Provinces at the date of the Union "relative to the qualifications and disqualifications of persons to be elected or sit as members of the Assembly. . . . , the qualifications or disqualifications of voters, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which such elections may be continued, and the trial of controverted elections and the proceedings incident thereto, the vacating of the seats of members," etc., were made applicable to elections of members to the Legislative Assemblies of the two Provinces: The duration of the Legislative Assemblies was to be four years, subject to prior dissolution by the Lieutenant-Governor: And those provisions of the Act which had been laid down for the House of Commons of Canada as to the election, duties and absence of the Speaker; the quorum; and the modes of voting; were made applicable also—as if re-enacted—to the Legislative Assemblies of Ontario and Quebec respectively. [Secs. 81-87.]

Such were the provisions of the British North America Act as to the constitution of the Legislatures of Ontario and Quebec. The Act also made certain general provisions for the constitution of the Legislatures of all the four Provinces which were original members of the Union. Thus Sec. 90 enacted that:—

"The following provisions of this Act respecting the Parliament of Canada—namely, the provisions relating to Appropriation and Tax Bills, the recommendation of Money Votes, the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved—shall extend and apply to the Legislatures of the several Provinces as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, of one year for two years, and of the Province for Canada."

[Comment upon the effect of this section has been made in the chapter on "The Governor-General."]

And Sub-sec. 1 of Sec. 92 gives the Provinces exclusive power as to :—
“ the amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Lieutenant-Governor.”

Amendment
of Provincial
Constitutions.

This power has been exercised by many of the Provinces of Canada—as far as the alteration of the composition of their Legislatures is concerned. Thus :—

- (1) *Ontario* has retained its single Chamber, but has increased the number of members from 82 to 98.
- (2) *Quebec* has retained its two Chambers. The Legislative Council has still 24 members. The number of members of the Legislative Assembly has been raised from 65 to 74.
- (3) *Nova Scotia* has also retained its two Chambers. The Legislative Council consists of 21 members nominated by the Lieutenant-Governor for life. The House of Assembly has 38 members elected for a term of five years.
- (4) *New Brunswick* abolished its Legislative Council in 1891. Its Legislature now consists of a Legislative Assembly of 46 members.
- (5) *Manitoba* was admitted to the Dominion in 1870 as a Province with a Legislature of two Chambers. The Legislative Council was abolished in 1876. The Provincial Legislature now consists of a Legislative Assembly of 41 members elected on manhood suffrage for four years.
- (6) *British Columbia* entered the Dominion in 1871. It has a Legislature of a single Chamber, called the Legislative Assembly, which consists of 42 members elected on manhood suffrage for four years.
- (7) *Prince Edward Island* joined the Union in 1873. It has only a Legislative Assembly of 30 members.
- (8) *Saskatchewan* became a Province of the Dominion in 1905. It has a Legislative Assembly of 25 members.
- (9) *Alberta* also became a Province in 1905, and has also a Legislative Assembly of 25 members.

The following table shows the present representation of each of the Canadian Provinces in the Dominion Legislature :—*

Representation
of Canadian
Provinces in
Dominion
Legislature.

Province.	No. of Members in Senate.	No. of Members in House of Commons.
Ontario	24	86
Quebec	24	65
Nova Scotia	10	18
New Brunswick	10	13
Manitoba	4	10
British Columbia	3	7
Prince Edward Island	4	4
Saskatchewan	4	6
Alberta	4	4
Total	87	213†

† The Yukon Territory has also 1 member in the Dominion House of Commons.
* From Colonial Office List, 1908.

Australia.

In Australia the Commonwealth Act specially provides for the retention of the Constitutions of the several States. Thus Sec. 106 says that :—

“The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.”

The establishment of the Commonwealth has had some effect upon the form of the Legislatures of the several States. Thus :—

- (i.) *New South Wales* reduced the number of members of its Legislative Assembly in 1904 from 125 to 90. The Legislative Council still has 61 members [unpaid].
- (ii.) *Victoria* in 1903 reduced the number of members in both Houses. The Legislative Council now consists of 34, and the Assembly of 65 members.
- (iii.) *Queensland* has made no alteration. Her Upper House has 44, and her Lower House 72 members.
- (iv.) *South Australia* reduced the membership of her Legislative Council in 1901 from 52 to 18; and that of her House of Assembly from 54 to 42.
- (v.) *Tasmania* has made no alteration. The Legislative Council has 18 members, and the Assembly 35.
- (vi.) *Western Australia* has also made no alteration since the establishment of Federation. Her Legislative Council consists of 30, and her Legislative Assembly of 50 members.

*Representation of States in Commonwealth Legislature.**

[As in September, 1907.]

State.	No. of Members in Senate.	No. of Members in House of Representatives.
New South Wales	6	27
Victoria	6	22
Queensland	6	9
South Australia	6	7
Western Australia	6	5
Tasmania	6	5
Total	36	75

United States.

The Constitution of the United States makes no provision as to the Constitutions of the several States of the Union; though Article IV., Sec. 4, enacts that :—

“The United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and, on application of the Legislature, or of the Executive [when the Legislature can not be convened] against domestic violence.”

* Extracted from Colonial Office List, 1908.

In view of the facts that the constitutional limitations on the powers of the States are dealt with in the chapters on "Distribution of Legislative Power" and "Revenue"; and that the Constitutions of the several States are otherwise not affected by the Union Act, it appears to be unnecessary to discuss the form of the State Legislatures in the United States.

Article 6 of the Swiss Constitution provides that :—

Switzerland.

"The Cantons are required to demand of the Union its guaranty for their Constitutions.

"The Union shall accord this guaranty provided—

"(a) That they contain nothing contrary to the provisions of the Federal Constitution ;

"(b) That they provide for the exercise of political rights according to Republican [either representative or democratic] forms ;

"(c) That they have been accepted by the people and can be revised whenever an absolute majority of the citizens demands it."

A recent writer* on the Swiss Federal Constitution says that "the Constitutions are, in fact, amended with great frequency, especially in German Switzerland. In the four years from 1891 to 1895, for example, no less than twenty-three revisions took place, of which four were total revisions—that is, cases where a new Constitution was substituted for the old one. Such a continual revision naturally involves the copying of one Canton by another, and hence the process might be expected to result in making the Constitutions all alike, so that a single type would prevail over the whole country. To some extent that is the case : but a number of the older Cantons have preserved their traditions and still retain their ancient forms of government."

As to the form of the Cantonal Legislatures in Switzerland, Mr. Lowell goes on to draw a contrast between those Cantons in which the *Landsgemeinde* or mass-meeting of all the citizens has survived, and those which have adopted a more modern form of government. In the former the taxes, loans and more important expenditures are voted, and both ordinary laws and amendments of the Constitution passed by what is literally a meeting of all the citizens. The meeting is assisted by an executive council which prepares beforehand the business to be performed. In the latter "all their governments are constructed upon one general type. Each of them has a single Legislative Chamber, usually known as the Great Council, which is elected by universal suffrage, and in all but a couple of Cantons is chosen for either three or four years. It passes the laws, votes the taxes and appropriations, supervises the administration and appoints a number of the more important officials." Mr. Lowell also draws attention to three methods of limiting the power of the Great Councils of the Cantons. The first—which exists in seven of the German Cantons—is a provision by which a certain number of citizens "can require a popular vote

* Mr. A. L. Lowell : "Governments and Parties in Continental Europe," Vol. II., p. 221.

on the question whether the Great Council shall be dissolved. If a majority of the votes cast is in the affirmative, the term of the Council comes to an end and a new election is immediately held." The second, is a demand for the revision of the Cantonal Constitution, in accordance with a provision of most of the Constitutions that the question of revision must be submitted to the popular vote on the demand of a certain number of citizens. The third is a system of proportional representation, which has recently been adopted in many of the Cantons.

II. STATE-GOVERNORS.

Canada.

Just as the British North America Act makes specific provision for the constitution of the Legislatures in Ontario and Quebec, so does it provide for the appointment by the Governor-General of a Lieutenant-Governor for each Province, who is assisted by a Provincial Executive Council. The material sections of the British North America Act are the following :—

Sec. 58. For each Province there shall be an officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by instrument under the Great Seal of Canada.

Sec. 59. A Lieutenant-Governor shall hold office during the pleasure of the Governor-General; but any Lieutenant-Governor appointed after the commencement of the first session of the Parliament of Canada shall not be removable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message to the Senate and to the House of Commons within one week thereafter if the Parliament is then sitting, and if not then, within one week after the commencement of the next session of the Parliament.

Sec. 60. The salaries of the Lieutenant-Governors shall be fixed and provided by the Parliament of Canada.

Sec. 61. Every Lieutenant-Governor shall, before assuming the duties of his office, make and subscribe before the Governor-General, or some person authorised by him, oaths of allegiance and office similar to those taken by the Governor-General.

Sec. 62. The provisions of this Act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the time being of each Province or other the Chief Executive Officer or Administrator for the time being carrying on the Government of the Province, by whatever title he is designated.

Sec. 63. The Executive Council of Ontario and Quebec shall be composed of such persons as the Lieutenant-Governor from time to time thinks fit, and in the first instance of the following officers, namely, the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, within Quebec, the Speaker of the Legislative Council and the Solicitor-General.

Sec. 64. The constitution of the executive authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union, until altered under the authority of this Act.

Sec. 65. All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised, after the

Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the advice, or with the advice and consent of, or in conjunction with the respective Executive Councils or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be abolished or altered by the respective Legislatures of Ontario and Quebec.

Sec. 66. The provisions of this Act referring to the Lieutenant-Governor in Council shall be construed as referring to the Lieutenant-Governor of the Province acting by and with the advice of the Executive Council thereof.

Sec. 67. The Governor-General in Council may from time to time appoint an administrator to execute the office and functions of Lieutenant-Governor during his absence, illness, or other inability.

Under these sections of the British North America Act, several important constitutional questions have arisen.* But they have all depended for their decision upon the particular terms of the Act, and do not demand discussion in the limited space available here.

The Australian Constitution, on the other hand, makes no Australia. specific provision for the appointment of State Governors. This is only natural in view of the fact that Sec. 106—as has been pointed out above—provides for the continuance of the Constitution of each State as at the establishment of the Commonwealth. The Governors of each State are, therefore, still appointed by the Crown under Letters Patent, as they were before the adoption of Federation. But the State Governors in Australia are no longer Commanders-in-Chief of the Military and Naval Forces in the State, as the Governor-General is now vested with that command.

On the establishment of the Commonwealth, new Letters Patent and Commissions were issued to the Australian State Governors. They also still have the pardoning power—as far as offences within the State against the laws of the State, or for which the offender may be tried therein [*i.e.*, apparently, in the State, not the Commonwealth, Courts]—whereas this power is denied to the Lieutenant-Governors of the Canadian Provinces.

III. PUBLIC DEBTS OF THE STATES.

Article VI., Sec. 1 of the Constitution of the United States reads United States. as follows :—

“All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.”

But this provision referred to the war-debt of the Confederate Government. No provision was made for the taking over by the United States of the public debt of the several American States.

* [*Vide* the cases of *Maritime Bank of Canada vs. New Brunswick Receiver-General* (1892, Appeal Cases, p. 437). *Lenoir vs. Ritchie* (3 Sup. Ct. Rep., 575). *Attorney-General of Canada vs. Attorney-General of Ontario* (3 Ontario Appeal Rep., 6). *Letellier's Case* (Leggo's Lord Dufferin, p. 653). *Attorney-General of Quebec vs. Reed* (10 P.C. App. Cases, p. 141). All these cases are discussed by Wheeler : “Confederation Law of Canada,” pp. 27-35.]

The United States Constitution thus left to the separate States the management of their public debt. "Nothing" [says Mr. Bryce, *American Comm.*, Vol. II., p. 138] "in the financial system of the States better deserves attention than the history of the State debts, their portentous growth, and the efforts made, when the people had taken fright, to reduce the amount and to set limits to them in the future State indebtedness, which in 1825 [when there were twenty-four States] stood at an aggregate over the whole Union of 12,790,728 dollars [£2,500,000], had in 1842 reached 203,777,916 dollars [£40,000,000], and in 1870, 352,866,898 [£70,000,000] The huge and increasing total startled the people and, as everybody knows, some States repudiated their debts. The diminution in the total indebtedness of 1880, which stood at 250,722,081 dollars [£50,144,000], and is the indebtedness of thirty-eight States, is partly due to this repudiation. . . . The disease spread till it terrified the patient, and a remedy was found in the insertion in the Constitutions of the States of provisions limiting the borrowing powers of State Legislatures. . . . For the last thirty years, whenever a State has enacted a Constitution, it has inserted sections restricting the borrowing powers of States and local bodies and often also providing for the discharge of existing liabilities. Not only is the passing of Bills for raising a State loan surrounded with special safeguards, such as the requirement of a two-thirds majority in each House of the Legislature; not only "is there a prohibition ever to borrow money for, or even to undertake, internal improvements [a fertile source of jobbery and waste, as the experience of Congress shows]; not only is there almost invariably a provision that whenever a debt is contracted, the same Act shall create a sinking fund for paying it off within a few years, but in most Constitutions the total amount of the debt is limited, and limited to a sum beautifully small in proportion to the population and resources of the State. Thus Wisconsin fixes its maximum at 200,000 dollars [£40,000]; Minnesota and Iowa at 250,000; Ohio at 750,000; Nebraska at 100,000; prudent Oregon at 50,000; and the great and wealthy State of Pennsylvania, with a population now exceeding 5,000,000 [Constitution of 1873, Art. IX., Sec. 4.], at 1,000,000 dollars." ["New York—Constitution of 1846, Art. VII., Secs. 10-12—also names a million dollars as the maximum, but permits laws to be passed raising loans for 'some single work or object,' provided that a tax is at the same time enacted sufficient to pay off this debt in eighteen years; and that any such law has been directly submitted to the people and approved by them at an Election."]

Canada.

In Canada, on the other hand, elaborate provisions were made for the assumption by the Dominion of the public debt of the Provinces, by the following sections of the British North America Act :—

Sec. 111. Canada shall be liable for the debts and liabilities of each Province existing at the Union.

Sec. 112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the Union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Sec. 113. The assets enumerated in the fourth schedule to this Act, belonging at the Union to the Province of Canada, shall be the property of Ontario and Quebec conjointly.

Sec. 114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Sec. 115. New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Sec. 116. In case the public debts of Nova Scotia and New Brunswick do not at the Union amount to eight million and seven million dollars respectively they shall respectively receive, by half-yearly payments in advance from the Government of Canada, interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

Sec. 117. The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.

Sec. 118. The following sums shall be paid yearly by Canada to the several Provinces for the support of their Government and Legislature :

	Dollars.
Ontario	Eighty thousand.
Quebec	Seventy thousand.
Nova Scotia	Sixty thousand.
New Brunswick	Fifty thousand.

Two hundred and sixty thousand.

and an annual grant in aid of each Province shall be made, equal to eighty cents per head, of the population as ascertained by the census of one thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two Provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grant shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each Province : but the Government of Canada shall deduct from such grants, as against any Province, all sums chargeable as interest on the public debt of that Province in excess of the several amounts stipulated in this Act.

Sec. 119. New Brunswick shall receive, by half-yearly payments in advance from Canada, for the period of ten years from the Union, an additional allowance of sixty-three thousand dollars per annum ; but as long as the public debt of that Province remains under seven million dollars, a deduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of sixty-three thousand dollars.

The following particulars as to the assumption of the public debt of the respective Canadian Provinces by the Dominion Government are taken from a very interesting article contributed to Vol. V. of the "Encyclopædia of Canada" [published in 1899] by the Hon. G. E. Foster, at one time Finance Minister of the Dominion. Taking a period of thirty years—from 1867 to 1897—he examines the development of the public debt of Canada. The information contained in his article can be divided under two heads.

Assumption of
State Debts,
Canada.

(i.) Provincial Debt actually taken over by the Dominion :

With regard to this Mr. Foster explains that “ in some Provinces the debt was comparatively small, whilst in Ontario and Quebec it was comparatively large, and the disparity was equalised by the expedient of assuming a certain proportion of the debt of the latter, and by allowing to the former a nominal debt larger than the actual one, the excess of which should remain as an asset of the Province with interest at 5 per cent. per annum, until it should be absorbed. For the excess of the debt of Ontario and Quebec above what was assumed by the Dominion, the Federal Government was liable ; but on this excess the Provincial Governments were to pay interest to the Dominion at 5 per cent. per annum. In further explanation of the classes of debt mentioned above, it may be said that the division of assumed indebtedness settled in 1867 was subsequently altered on various occasions, either because in itself it was considered inequitable, or because it was deemed advisable in the interests of the Provinces to grant further relief, or in consequence of the admission of new Provinces to the Dominion. With these explanations let me examine briefly the growth and extent of the Federal debt. In 1867, under the Act of Confederation, the allocation of assumed indebtedness was as follows :—

		Dollars.
For the Provinces of Ontario and Quebec	..	62,500,000
For the Province of Nova Scotia		8,000,000
For the Province of New Brunswick		7,000,000

Total	..	77,500,000

In 1869 a further allowance was made to Nova Scotia of 1,186,756 dollars, and this was read into the terms of 1867 in such a way that Nova Scotia should be considered as having entered Confederation with a debt of 9,186,756 dollars. In 1870 Manitoba was added to the Union with a debt allowance of 472,090 dollars. In 1871 British Columbia came into Confederation with a debt allowance of 1,666,200 dollars. In 1873 Prince Edward Island entered with a debt of 4,927,060 dollars. In 1873 Ontario and Quebec were allowed the excess of their actual over their assumed debt of 1867, which excess amounted to 10,506,089 dollars—*i.e.*, the Dominion assumed this in addition to the 62,500,000 dollars assumed in 1867 ; and in order to preserve equality, proportional increases were allowed to Nova Scotia, New Brunswick, Manitoba and British Columbia. Again, in 1884, re-adjustments were made which resulted in increases in the assumed debts of all the Provinces ; and in 1886 a substantial increase took place in the case of Manitoba.

“The following table will best illustrate the details and final result of the various adjustments above noted :—

Debt Allowances to Provinces.

[Dollars].

Year.	Ontario and Quebec.	Nova Scotia.	New Brunswick.	Manitoba.	British Columbia.	P. F. Island.
1867 ..	62,500,000	9,186,756	7,000,000	—	—	—
1872 ..	—	—	—	—	1,666,200	—
1873 ..	10,506,088	1,344,780	1,176,680	551,447	280,084	—
1874 ..	—	—	—	—	—	4,927,060
1884 ..	5,397,502	793,368	604,519	110,825	83,107	182,973
1885 ..	—	5,420	—	—	—	—
1886 ..	—	—	—	3,113,333	—	—
Total ..	78,403,590	11,330,324	8,781,199	3,775,605	2,029,391	5,110,033

[N.B.—In this Table Mr. Foster appears to have omitted the allowance of 472,090 dollars made to Manitoba in 1870.]

“The total final indebtedness of, and for, the Provinces assumed by the Federal Government is now [July 1, 1897] 109,430,148 dollars—a very considerable portion of the whole public debt of Canada.”

(ii.) *Public Debt of Canada payable in London, 1867–1897.*

“The total debt payable in London in 1867 was 67,069,115 dollars, of which 34,565,500 dollars—or over one-half—bore 6 per cent. interest ; 31,822,282 dollars bore 5 per cent. ; and the remaining 681,333 dollars was running at 4 per cent., being a loan guaranteed by the Imperial Government. In 1872 $9\frac{1}{2}$ per cent. of the loans payable in London bore 4 per cent. interest [guaranteed by the British Government] ; 45 per cent. bore five per cent., and $45\frac{1}{2}$ per cent. ran at six per cent. In 1882 the loans bearing six per cent. were only $7\frac{1}{2}$ per cent. of the total payable in London, those bearing five per cent. were $25\frac{1}{2}$ per cent. of the total, whilst those bearing four per cent. interest were 67 per cent. of the total. By June 30th, 1897, the whole of the six per cent. bonds had disappeared ; but 2,433,333 dollars remained of the five per cent. bonds : 140,856,894 dollars bore four per cent. ; 24,333,333 dollars bore $3\frac{1}{2}$ per cent., and 50,602,241 dollars bore three per cent. In the autumn of that year, a loan was placed in London which, including costs and charges, bore $2\frac{3}{8}$ per cent.—and this latest loan marks the strong contrast between 1867 and the present, and emphasises the immensely cheaper borrowing as compared with the opening years of Confederation.”

For the practical working of the finances of the Dominion after the assumption of the Provincial Debts, the British North America Act established a Consolidated Revenue Fund consisting of "all duties and revenues over which the respective Legislatures before and at the Union had and have power of Appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act." [Sec. 102.] Further, "all stocks, cash, bankers' balances and securities for money belonging to each Province at the time of the Union, except as in this Act mentioned," were declared to be the property of Canada and were to be taken in reduction of the Provincial debts [Sec. 107]; whilst certain public works and property of each Province—enumerated in the 3rd schedule—were declared to be the property of Canada [Sec. 108].

Australia.

Sec. 105 of the Constitution of Australia says that :—

"The Parliament may take over from the States their public debts as existing at the establishment of the Commonwealth, or a proportion thereof according to the respective numbers of their people, as shown by the latest statistics of the Commonwealth, and may convert, renew or consolidate such debts or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States." [*Vide* also Sec. 87.]

The Constitution of Australia therefore stands mid-way between that of the United States and Canada in this respect. The power given by Sec. 105 has not yet been exercised, though several attempts have been made to put it into force. Messrs. Quick and Garran give the following statement of the Public Debt of the Australian States at Federation [based on *Coghlan's Statistics of the seven Colonies*, 1900, p. 25] :—

*Colony.	Public Debt.	Indebtedness <i>per capita</i> .
	£	£ s. d.
New South Wales	65,332,993	48 0 0
Victoria	49,324,885	42 4 6
Queensland	34,349,414	70 7 9
South Australia	26,156,180	70 16 5
Western Australia	11,804,178	66 4 11
Tasmania	8,413,694	46 3 1
Total ..	£195,381,344	Av. £52 2 10

* Annot. Const. Australian Comm., p. 925.

CHAPTER XVI.

AMENDMENT OF THE CONSTITUTION.

The amendment of the Constitution of the United States is United States. provided for in Art. V. :—

“ The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of two-thirds of the several States, shall call a Convention proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States or by Conventions of three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress : Provided that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth Section of the first Article ; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.”

Mr. Bryce [*American Commonwealth*, vol. i., chap. xxxii.] analyses the actual amendments which have been made in the Constitution under Article V. He points out that all these amendments have been proposed and sanctioned in the first of the two alternative ways which Article V. lays down for the proposition and ratification of amendments. He divides the amendments into four groups.

“ The first group, including ten amendments made immediately after the adoption of the Constitution, ought to be regarded as a supplement or postscript to it, rather than as changing it. They constitute what the Americans, following the English precedent, call a Bill of Rights, securing the individual citizen and the States against the encroachments of Federal power.” [*These ten amendments were proposed by the first Congress, having been framed by it out of 103 amendments suggested by various States, and were ratified by all the States but three. They took effect in December, 1791.*] “ The second and third groups, if a single amendment can be properly called a group [*viz., amendments XI. and XII.*], are corrections of minor defects, which had disclosed themselves in the working of the Constitution.” [*The XIth amendment negatived a construction which the Supreme Court had put upon its own judicial powers ; the XIIth corrected a fault in the method of choosing the President.*] “ The fourth group is the only one which marked a political crisis and registered a political victory. It comprises three amendments [*XIII., XIV., XV.*] which forbid slavery, define citizenship, secure the suffrage of citizens against attempts by States to discriminate to the injury of particular classes, and extend Federal protection to those citizens who may suffer from the operation of certain kinds of unjust State laws. These three amendments are the outcome of the War of Secession, and were needed in order to confirm and secure for the future its results. The requisite majority of States was obtained under conditions altogether abnormal, some of the lately conquered States ratifying whilst actually controlled by the Northern Armies, others as the price which they were obliged to pay for the re-admission to Congress of their Senators and Representatives.” [“ The Thirteenth amendment was

proposed by Congress in February, 1865, ratified and declared in force December, 1865; the XIVth was proposed by Congress in June, 1866, ratified and declared in force June, 1868; the XVth was proposed by Congress February, 1869, ratified and declared in force March, 1870. The XIVth amendment had given the States a strong motive for enfranchising the negroes by cutting down the representation in Congress of any State which excluded male inhabitants—being citizens of the United States—from the suffrage; the XVth went further and forbade 'race, colour or previous condition of servitude' to be made a ground of exclusion. The grounds for this bold step were succinctly set forth by Senator Willey—of West Virginia—when he said that the suffrage was the only sure guarantee the negro could have in many parts of the country for the enjoyment of his civil rights; that it would be a safer shield than law, and that it was required by the demands of justice, the principles of human liberty and the spirit of Christian civilization. The effect of these three amendments was elaborately considered by the Supreme Court—in 1872—in the so-called *Slaughter-House Cases* [16 Wall., 82], the effect of which is thus stated by Mr. Justice Miller: 'With the exception of the specific provisions in the three amendments for the protection of the personal rights of the citizens and people of the United States, and the necessary restrictions upon the power of the States for that purpose, with the additions to the power of the general government to enforce those provisions, no substantial change has been made in the relations of the State Governments to the Federal Government.'"] "The details belong to history: All we need here note is that these deep-reaching, but under the circumstances perhaps unavoidable, changes were carried through, not by the free-will of the peoples of three-fourths of the State, but under the pressure of a majority, which had triumphed in a great war, and used its command of the military strength and Federal Government of the Union to effect purposes deemed indispensable to the reconstruction of the Federal system."*

Mr. Bryce points out that many other amendments have been proposed but that very few of these have received the requisite two-thirds majority of Congress and that none have actually been ratified. Yet "alterations, though perhaps not large alterations, have been needed, to cure admitted faults or to supply dangerous omissions." But the process of amendment has been found to be so difficult in its practical operation that the actual working of the Constitution in this respect has been left to two indirect agencies, viz., the interpretation of the Constitution by the Federal Courts and its development by usage.

Canada.

The Canadian Constitution makes no provision for its own amendment; though the first sub-section of Section 92 gives the Provincial Legislatures power to make laws dealing with "the amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of the Lieutenant-Governor." Two views may be taken of this omission in the British North America Act. The first is that the unlimited and undefined nature of the power given to the Dominion Government [under Sec. 91] "to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," would include that of amendment of the Act itself. That is to say that the Dominion Parliament could

* Bryce: *American Commonwealth*, vol. I., pp. 484-485. (The quotations in brackets in the text are Bryce's footnotes).

pass an amending Act which would not have to receive the sanction of the Imperial Parliament, but would become the law of Canada merely on its being assented to by the Governor-General, if that were possible. As illustrating this view, a remark of Lord Davey during the hearing of *Fielding vs. Thomas* before the Privy Council * may be quoted. Upon an observation by Counsel to the effect that :—“The Canadian Parliament has no power at all given to it to alter the Constitution of Canada,” Lord Davey said :—“That is a big question that it would be unwise to express an opinion upon. There is ‘peace, order and good government of Canada.’” The second view, however, is probably the more correct. It is that the Federal Parliament cannot amend the British North America Act ; and this view is well expressed by Mr. Bernard Holland † :—“The Canadian Constitution, being the act of the Imperial Parliament, can only be amended by that Parliament, or by the Canadian Parliament with the permission and authority of the Imperial Parliament. In practice, no doubt, a direct ‘reference’ to the Canadian electorate would precede any such amendment, and the Imperial Parliament would sanction almost any amendment upon which the Canadians were agreed.”

The Australian Constitution, however, forsakes the Canadian precedent and goes back to that of the United States. An amendment passed as provided by the Constitution need not go before the Imperial Parliament but is merely “presented to the Governor-General for the Queen’s assent.” “Thus the Imperial Parliament, in sanctioning the Australian Constitution, has surrendered its power of amending that Constitution, although in theory it retains the power of amending the Canadian Constitution, and its formal consent would be necessary in the latter case.”‡ Australia.

Section 128 of the Australian Constitution is that which provides for its amendment. It is as follows :—

“This Constitution shall not be altered except in the following manner :—

“The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses, the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

“But if either House passes any such proposed law by an absolute majority and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if, after an interval of three months, the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House and either with or without any amendments subsequently agreed to by both Houses to the electors in each State qualified to vote for the election of the House of Representatives.

* 1896 A.C., 600.

† *Imperium et Libertas*, p. 182.

‡ *Bernard Holland : Imperium et Libertas*, p. 184.

"When a proposed law is submitted to the electors, the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

"And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

"No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of electors voting in that State approve the proposed law."¹

Mr. Burgess ["Political Science" I., p. 57] gives the following analysis of the ultimate governing power under the Australian Constitution :—

"The Commonwealth, as a political entity and a political partnership, is outside of, and supreme over the Constitution; it is outside of, and supreme over the Government provided by that Constitution. The Government of the Commonwealth, consisting of two sets of legislative, executive and judicial departments, central and provincial [*i.e.*, those of the Central Government and those of the States] does not constitute the community. At the back of the Government lies the amending power—the *quasi* sovereign organisation of the Commonwealth within the Constitution; at the back of the Commonwealth and the Constitution is the British Parliament, its creator and guardian, whose legal relationship to it requires that the Commonwealth should be described, not as an absolutely foreign organisation, but by some term indicating a degree of subordination to that body." . . . "What is really meant by such expressions as 'Federal State' or 'Federal Commonwealth,' technically inaccurate, is a National State with a Federal Government—a dual system of government under a common sovereignty. Such a State comprehends a population previously divided into a group of independent States. Certain causes have contributed to a union of this group of States into a single State, and the new State has constructed a government for the general affairs of the whole State, and has left to the old bodies, whose sovereignty it has destroyed, certain residuary powers of government, to be exercised by them so long as the new State makes no other disposition. The old States become part of the Government in the new State and nothing more."

Whilst the power of amendment of the Australian Constitution thus lies in the people of the Commonwealth, who can exercise it in a certain defined manner, subject to the sanction of the Imperial Parliament, it is also subject to certain constitutional restrictions, which are thus summarised by Messrs. Quick and Garran * :—

"No amendment :—

- "(1) Diminishing the proportionate representation of any State in either House of the Parliament. [Secs. 7.24.];
- "(2) Diminishing the minimum number of representatives of a State in the House of Representatives. [Sec. 24.]
- "(3) Increasing, diminishing, or otherwise altering the limits of a State. [Sec. 123];
- "(4) Affecting the provisions of the Constitution in relation to the foregoing matters;

may be carried unless a majority of the electors voting in the State interested approve of the proposed law."

* "Annotated Const. Australian Comm.," p. 991.

Messrs. Quick and Garran also supply the following note upon the limits of the amending power in the Australian Constitution :—

“ There are no specific limitations upon the scope of the amending power. No part of the Constitution is excluded from the possibility of amendment ; though amendments of a certain kind require ‘ a species of unanimity ’ which makes such amendments very difficult. The power of amendment, therefore, extends to every part of the Constitution—even to Sec. 128 itself, which defines the mode of amendment.

“ If, therefore, the Commonwealth were a sovereign and independent State, no amendment duly passed in the prescribed form, would be beyond its powers ; the amending power would have no limits. But the Commonwealth is only *quasi*-sovereign, and the amending power, though above the State Governments and above the Federal Government, is below the Imperial Government.”

In Germany [under Art. 78, Secs. 1 and 2] amendments of the Germany. Constitution are to be made by legislative enactment. If fourteen votes are cast against a proposed amendment in the Federal Council it is considered as rejected ; and “ the provisions of the constitution of the Empire by which certain rights are secured to particular States of the Union in their relation to the whole, shall only be modified with the consent of the States affected.”

In Switzerland, the following provisions are made as to the Switzerland. amendment of the Constitution. Certain alterations were made in the clauses of the Constitution of 1874 dealing with amendments by an amendment passed in 1891. These alterations are printed below in brackets and italics :—

“ The Federal Constitution may at any time be [*wholly or partially*] amended. Art. 118.

“ A [*total*] revision is secured through the forms required for passing Federal laws. Art. 119.

“ When either House of the Federal Assembly passes a resolution for the [*total*] revision of the Federal Constitution and the other House does not agree ; or when 50,000 Swiss voters demand a [*total*] revision, the question whether the Constitution ought to be amended is, in either case, submitted to the Swiss people, who vote yes or no. If in either case a majority of the Swiss citizens who vote pronounce in the affirmative, there shall be a new election of both Houses for the purpose of undertaking the revision. Art. 120.

“ [*A partial revision may take place by means of the popular initiative, or through the forms prescribed for ordinary Federal Legislation. The popular initiative consists in a demand by 50,000 Swiss voters for the addition of a new Article of the Constitution, or the repeal or modification of certain Constitutional Articles already in force*] Art. 121.

“ The revised Federal Constitution [*or the revised part thereof*] shall take effect when it has been adopted by the majority of Swiss citizens who take part in the vote thereon, and by a majority of the States. Art. 123.”*

* *Vide* Appendix E “ The Referendum in Switzerland.”

CHAPTER XVII.

ADMISSION OF NEW STATES.

United States. The Constitution of the United States [Article IV., Section III.] provides that :—

(1) “ New States may be admitted by the Congress into this Union ; but no new State shall be formed or erected within the jurisdiction of any other State ; nor any State be formed by the junction of two or more States or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress.]

(2) “ The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States ; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.”

“ States ” and
“ Territories.”

In considering the effect of this section, it is important to bear in mind the distinction between a “ Territory ” and a “ New State.” Territory—not included in any State of the Union at the time when the Constitution was ratified—but belonging at that time to the United States, is regulated, as far as its government is concerned, by the second sub-section. To this has been added other territory, acquired by the United States as a result either of treaty or conquest, which has then become subject to the provisions of the second sub-section. Out of this territory—either held by the United States at the time of the Union, or subsequently acquired—new States have from time to time been formed and admitted to the Union under the power given to Congress by the first sub-section.

New States. The working of the United States Constitution in this respect may thus be considered under two heads :—

(i.) *Admission of New States.*

In the first place, Congress may admit a part, or the whole, of any territory as a new State under certain specified conditions. Thus “ when Missouri applied for admission as a State in the American Union, she was received on the condition that the Constitution should never be construed to authorise the passage of an Act by which any of the citizens of other States should be excluded from the enjoyment of any of the privileges and immunities to which they were entitled under the Constitution of the United States [*Benton's Thirty Years' View*, ch. 2]. The State of Michigan was admitted to the Union on the condition that she should surrender to the State of Ohio certain territory which had been the

subject of dispute between them, and her consent was required to be given by a convention of delegates chosen by the people for the purpose [*Campbell's Hist. Mich.*, ch. 14]. The State of Arkansas was admitted on the condition that its Constitution should never deprive any citizen or class of citizens of the right to vote who were entitled to vote by the Constitution at the time that instrument was presented for the approval of Congress [*Cooley's Const. Law*, pp. 192-194]."*

As to the general principles on which the United States Congress has acted as to the admission of New States, "Congress [says Dr. Burgess, *Political Science*, II., 163] ought not to pass its enabling Act until it is clear that such a population is fully prepared to exercise the powers of local self-government and to participate in the general government. When this moment has arrived, Congress ought not to withhold its enabling Act. This is a matter, however of political ethics, not of Constitutional law; and the Congress alone must judge when the proper requirements shall have been fulfilled to warrant the change from centralised to Federal government in any part of the territory of the United States. I think, however, we may say that the Congress is constitutionally bound not to clothe with commercial powers any population which is unrepubli- can in its character—nor, perhaps, any population which is unnational in character. But of this character, again, the Congress must be the judge. The conclusion is that the Constitution recognises no natural right to State powers in any population, but views those powers as a grant from the Sovereign, which latter employs the Congress to determine the moment from which the grant shall take effect."

As to the effect of the admission of territory as a new State, it has been decided in a number of cases† that prior laws of Congress in relation to the territories and their government have no force in the new State after its admission and the adoption of a Constitution, unless they are adopted by that Constitution. [*Baker : Annotated Const. of U.S.*, p. 164.]

(ii.) *The Government of Territories.*

"The power of Congress over territories is general and plenary, arising under the powers granted in this section [III.], as well as being derived from the power to acquire territory, which latter right arises from the power to declare war and make treaties of peace." [*Mormon Church vs. United States*, 136 U.S., 1.] "All territory within the jurisdiction of the United States not included in any State must, necessarily, be governed by or under authority of Congress. The territories bear much the same relation to the general government that counties do to the States, and Congress may legislate for them as States do for their respective municipal

* Annot. Const. Australian Comm., p. 970.

† *Permoli vs. First Municipality*, 3 How., 589; *Strader vs. Graham*, 10 How., 94; *Scott vs. Sandford*, 19 How., 491; *Woodburn vs. Kilburn Manu- fact. Co.*, S.C. 1 Biss., 546.

sub-divisions." [*National Bank vs. County of Yanktown*, 101 U.S. 129.] "The Constitutional powers of Congress to enact laws for the government of the territories has passed beyond the stage of controversy to final judgment. The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants." [*Murray vs. Ramsey*, 114 U.S., 15—44.]*

Mr. Bryce [*American Commonwealth*, Vol. II., pp. 208-219] analyses the method of government which has been devised for the territories by Congress. He points out that the Territory not included in the thirty-eight States of the Union amounts to 1,460,624 square miles, divided as follows :—

Eight organised territories, viz., Dakota, Wyoming,					
Montana, Idaho, Washington, Utah, Arizona, New					
Mexico					
					859,325 sq. miles.
Two unorganised territories, viz.:					
Alaska					
					531,409 "
Indian Terr. W. of Arkansas					
					69,830 "
The Federal Dist. of Columbia					
					70 "

Of these the eight organised territories are far the most important. Their government rests on Federal Statutes, which take the place of State Constitutions. They each have a local Legislature with powers which are limited by Federal Statutes; a Governor, and a Judiciary. They are not represented in the United States Senate, but the House of Representatives admits a delegate from each of them to sit and speak, but not to vote. The Governor can veto Acts of the Legislature, and Congress has full power of disallowance over Acts so passed. In this respect the government of the territories resembles that of British Colonies. "Self-government is practically enjoyed by the territories, despite the supreme authority of Congress, just as it is enjoyed by Canada and the Australian Colonies of Great Britain despite the legal right of the British Parliament to legislate for every part of the Queen's Dominions. The want of a voice in Congress and Presidential elections, and the fact that the Governor is set over them by external power, are not felt to be practical grievances, partly of course because these young communities are too small and too much absorbed in the work of developing the country to be keenly interested in national politics."

Australia.

The Federal Constitution of Australia offers a much closer analogy to that of the United States, as far as the admission of new States is concerned, than does that of Canada. It will be convenient, therefore, to consider it here. The relevant sections are :—

121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

* These cases are cited by Baker : *Annot. Const. U.S.*, pp. 165, 166.

122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

One or two points in these sections require comment. As to the Territories. method of government of territories, the Australian Parliament has power to allow representatives of such territories to become members of, and to vote in, the Federal Parliament; whereas in the United States the territories cannot return members to Congress, though they are represented there by delegates who have no vote. The meaning of the word "territories" in the Australian Constitution would seem to be the same as in that of the United States, for Clause VI. of the covering Act defines "States" as meaning:

"Such of the Colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such Colonies or *Territories* as may be admitted into or established by the Commonwealth as States."

It is, therefore, clear that when the Australian Constitution refers to territories, it means country within the jurisdiction of the Commonwealth and not forming part of a State. Such territory may be acquired by the Commonwealth in three ways:

- (a) Surrendered by a State and accepted by the Commonwealth. [Sec. 111.]
- (b) Placed by the Queen under the authority of, and accepted by the Commonwealth. [Sec. 122.]
- (c) Otherwise acquired by the Commonwealth. [Sec. 122.]

When acquired in either of these three ways, territories pass—as in the United States—under the direct jurisdiction of the Federal Parliament; and the Constitution contemplates such territories as being, so to speak, in a condition of political tutelage preparatory to their attaining, when fit to do so, the full political status of States.

With regard to the admission of new States, the Federal Constitution of Australia makes a distinction between *original* States—i.e., States which were members of the Commonwealth at its formation—and States subsequently admitted. It differs from **New States.**

the Constitution of the United States in giving original States certain privileges which States subsequently admitted cannot claim as of right. Thus :—

- (a) The right of equal representation in the Senate applies only to Original States.
- (b) The provision that each State shall have at least five members in the House of Representatives applies only to Original States.
- (c) It is very doubtful whether the proportional representation of States in the House of Representatives—though expressed without qualification in Sec. 24—is not subject, in the case of new States, to the right of the Federal Parliament [under Sec. 121] to “make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.”

As to new States which may be admitted, Sec. 121 contemplates two kinds :—

(1) States which, prior to their entry into the Commonwealth, were already duly-constituted Colonies.

- (a) Australian Colonies not Original States, of which New Zealand is the only example.
- (b) Colonies erected, or to be erected, in other dominions of the Crown, *e.g.*, New Guinea and Fiji.

(2) States established in the jurisdiction of the Commonwealth :

- (a) Territories raised to the condition of States.
- (b) New States created out of States already in existence, by sub-division or otherwise, as contemplated in Secs. 123 and 124.

Canada.

The Canadian legislation on the subject of the admission of new Provinces of, and the addition of territory to, the Dominion, is as follows :—

(i.) *Sec. 146, B.N.A. Act, 1867* :—

“ It shall be lawful for the Queen, by and with the advice of Her Majesty’s Most Honourable Privy Council, on addresses from the Houses of the Parliament of Canada and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those Colonies or Provinces or any of them into the Union, and, on address from the Houses of the Parliament of Canada, to admit Rupert’s Land and the North-West Territory, or either of them, into the Union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act ; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.”

(ii.) This section was subsequently amended by *The British North America Act, 1871* : The preamble set out that “doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in territories admitted, or to be admitted, into the Dominion of Canada, and to provide for the

representation of such Provinces in the said Parliament"; and that "it is expedient to remove such doubts and to vest such powers in the said Parliament." The Act provided that:—

(a) *As to the government of territories :*

"The Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any Province." [Sec. 4.]

(b) *As to the Establishment and Constitution of Provinces :*

"The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province and for the passing of laws for the peace, order and good government of such Province, and for its representation in the said Parliament. [Sec. 2.]

"The Parliament may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby."

[N.B.—Prior to the passing of this Act, the Dominion Parliament had already provided for the admission of Manitoba as a Province, and for the temporary government of Rupert's Land and the North-Western Territory when united with Canada. This Act guaranteed the continued validity of these provisions.]

(iii.) *The British North America Act* of 1867 had made certain limitations [Secs. 22, 28, 37, 51, 147] upon the number of members of the Senate, and the representation of Provinces in the House of Commons, of the Dominion.

It was therefore necessary to pass *The British North America Act*, 1886. The preamble to this Act sets out that "it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House of Commons of Canada, or either of them, of any territory which for the time being forms part of the Dominion of Canada, but is not included in any Province." The Act proceeds to give the Dominion Parliament power "to make provision for the representation in the Senate and House of Commons of Canada, or either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any Province thereof."

The Act then goes on to safeguard any Act already passed by the Parliament of Canada for that purpose and not disallowed by the Queen. Further, it declares "that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act, or in *The British North America Act*, 1871, has effect notwithstanding anything in *The British North America Act*, 1867; and the number of Senators or the number of members of the House of Commons specified in the

Representation
of Territories.

Number of
Senators and
Members of
Dom. House
of Commons.

last-mentioned Act is increased by the number of Senators or of members, as the case may be, provided by any such Act of the Parliament of Canada for the representation of any Provinces or territories of Canada."

[Thus the conflict between the sections of the Act of 1867 which limited the number of members of either House of the Dominion Parliament, and the Acts of 1871 and 1886 increasing the number of such members, was reconciled. The actual representation of the Provinces and territories in the Dominion Parliament are given on p. 185.]

The creation of new Provinces of, and the addition of new territory to, the Dominion of Canada is therefore a subject of some complexity. What has actually taken place can best be described by dividing the subject into three heads:—

(i.) *Addition of new territory to the Dominion.*

As to this, the provisions of Sec. 146 of *The British North America Act* of 1867 applied only to Rupert's Land and the North-West Territory. That section provided that they could be added to the Dominion by Order in Council based on an address from the Dominion Parliament. Such an Order in Council, admitting them as *Territories*, was issued on 23rd June, 1870.

There is, however, no legislative provision for the addition of new territory—not comprised in Rupert's Land or the North-West Territory—to the Dominion. But the absence of such definite legislative provision has, as a matter of actual practice, been ignored. Thus on the 31st July, 1880, in compliance with the prayer of an address from the Parliament of Canada, dated the 3rd May, 1878, an Order in Council was issued annexing to the Dominion from 1st September, 1880, such British Possessions in North America [other than Newfoundland] as were not previously included in the Dominion.

(ii.) *Creation of new Provinces out of Dominion territory.*

It was upon this point that a doubt arose as to the power of the Dominion Parliament. In the year 1870 an Act was passed by that Parliament creating Manitoba a Province of the Dominion, from the 15th July, 1870—*i.e.*, from the same date as that upon which the whole of Rupert's Land [of which Manitoba was a part] was added as a territory to the Dominion by the Order in Council referred to above. There was, however, nothing in the Act of 1867 to justify the Dominion Parliament in creating a Province out of territory which was already part of the Dominion, and it was doubtless for this reason that *The British North America Act* of 1871 was passed by the Imperial Government. That Act gave the

Dominion Parliament power to raise the whole or part of territory into a Province, and expressly justified the Act of the Dominion Parliament in relation to the creation of the Province of Manitoba. The power given by the Act of 1871 has been exercised by the Dominion Parliament in the creation and admission into the Dominion of the two Provinces of Alberta and Saskatchewan from the 1st September, 1905.

(iii.) *Admission of States not within the Dominion as Provinces of the Dominion.*

Sec. 146 of *The British North America Act*, 1867, expressly contemplates the admission of Newfoundland, Prince Edward Island and British Columbia as Provinces of the Dominion, by means of Orders in Council to be promulgated by the Imperial Parliament upon the request of both the Dominion and the local Legislatures. Newfoundland has never been admitted. But British Columbia was admitted by Order in Council of the 16th May, 1871, and Prince Edward Island by Order in Council dated 26th June, 1873. As to the admission of these Provinces, it should be observed that the Canadian Constitution makes no discrimination between States which were original members of the Union and those which joined subsequently; for though *The British North America Act*, 1867, made certain limitations on the representation of new Provinces in the Dominion Parliament, these were abolished by the Act of 1886.*

* The position of the Hudson's Bay Company in relation to the admission of Rupert's Land to the Dominion, as defined and settled by *The Rupert Land Act*, 1868, and the Canada (Rupert's Land) Loan Act, 1869, is worthy of study. The acts are printed in Wheeler's *Confederation Law of Canada*, pp. 755 and 762.

Note also the case of *St. Catherine's Milling and Lumber Co. vs. The Queen* [Confed. Law. Can., p. 94] as illustrating the position of the Indian Territories; and *Riel's case* [Id., p. 538] as to the power of the Dominion Parliament to legislate for territories.

UNION CONSTITUTIONS.

CONSTITUTION OF THE UNITED STATES OF AMERICA.

WE, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION 1.

1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

SECTION 2.

1. The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and, until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any state,

the executive authority thereof shall issue writs of election to fill such vacancies.

5. The house of representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

SECTION 3.

1. The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years ; and each senator shall have one vote.

2. Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year ; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments, until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

4. The vice-president of the United States shall be president of the senate, but shall have no vote unless they be equally divided.

5. The senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

6. The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside ; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment, in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit, under the United States ; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION 4.

1. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof ; but the congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators.

2. The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5.

1. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business ; but a smaller number may

adjourn from day to day, and may be authorised to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION 6.

1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

SECTION 7.

1. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills.

2. Every bill which shall have passed the house of representatives and the senate shall, before it becomes a law, be presented to the president of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress, by their adjournment, prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment), shall be presented to the president of the United States ; and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be re-passed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8.

The congress shall have power :—

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States : but all duties, imposts, and excises shall be uniform throughout the United States :

2. To borrow money on the credit of the United States :

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes :

4. To establish an uniform rule of naturalisation, and uniform laws on the subject of bankruptcies, throughout the United States :

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures :

6. To provide for the punishment of counterfeiting the securities and current coin of the United States :

7. To establish post-offices and post-roads :

8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries :

9. To constitute tribunals inferior to the supreme court :

10. To define and publish piracies, and felonies committed on the high seas, and offences against the law of nations :

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water :

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years :

13. To provide and maintain a navy :

14. To make rules for the government and regulation of the military and naval forces :

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions :

16. To provide for organising, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress :

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square), as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of

forts, magazines, arsenals, dock-yards, and other needful buildings : And

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9.

1. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation, or other direct tax shall be laid, unless in proportion to the *census*, or enumeration hereinbefore directed to be taken.

5. No tax or duty shall be laid on articles exported from any state. No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another ; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

6. No money shall be drawn from the treasury, but in consequence of appropriations made by law ; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States : And no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

SECTION 10.

1. No state shall enter into any treaty, alliance, or confederation ; grant letters of marque and reprisal ; coin money ; emit bills of credit ; make anything but gold and silver coin a tender in payment of debts ; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws ; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States ; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION I.

1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and together with the vice-president, chosen for the same term, be elected as follows :—

2. Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress ; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

3. The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each ; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed ; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose by ballot one of them for president ; and if no person have a majority, then, from the five highest on the list the said house shall in like manner choose the president. But in choosing the president the votes shall be taken by states, the representation from each state having one vote ; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the vice-president.

4. The congress may determine the time of choosing the electors, and the day on which they shall give their votes ; which day shall be the same throughout the United States.

5. No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of president ; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal,

death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall then act accordingly, until the disability be removed, or a president shall be elected.

7. The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation :

9. " I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SECTION 2.

1. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States ; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present shall concur ; and he shall nominate, and, by and with the advice and consent of the senate shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments herein are not otherwise provided for, and which shall be established by law : but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

3. The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

SECTION 3.

1. He shall from time to time give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient ; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper ; he shall receive ambassadors and other public ministers ; he shall take care that the laws be faithfully executed and shall commission all the officers of the United States.

SECTION 4.

1. The president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for,

and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION I.

1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SECTION 2.

1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; to all cases affecting ambassadors, other public ministers, and consuls ; to all cases of admiralty and maritime jurisdiction ; to controversies to which the United States shall be a party ; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

2. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury ; and such trial shall be held in the state where the said crimes shall have been committed ; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SECTION 3.

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture of life except during the life of the person attained.

ARTICLE IV.

SECTION I.

1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And

the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2.

1. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

2. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

3. No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

SECTION 3.

1. New states may be admitted by the congress into this Union ; but no new state shall be formed or erected within the jurisdiction of any other state ; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

2. The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States ; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SECTION 4.

1. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion ; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V.

1. The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states or by conventions of three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress : Provided that no amendment which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article ; and that no state, without its consent, shall be deprived of its equal suffrage in the senate

ARTICLE VI.

1. All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

1. The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

AMENDMENTS TO THE CONSTITUTION.

ARTICLE I.

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by the law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ; nor shall he be compelled, in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ; and to be informed of the nature and cause of the accusation ; to be confronted with the witnesses against him ; to have compulsory process for obtaining witnesses in his favour ; and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

1. The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves ; they shall name in the ballots the person voted for as president, and in distinct ballots the person voted for as vice-president ; and

they shall make distinct lists of all persons voted for as president' and of all persons voted for as vice-president, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted: the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of the electors appointed; and if no person have such majority, then, from the persons having the highest numbers, not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

2. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person having a majority, then from the two highest numbers on the list, the senate shall choose the vice-president: a quorum for the purpose shall consist of two-thirds of the whole number of senators, a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States.

ARTICLE XIII.

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

1. All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state including Indians not taxed.

But when the right to vote at any election for the choice of electors for president and vice-presidents of the United States, representatives in congress, the executive and judicial officers of the State, or the members of the legislatures thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

3. No person shall be a senator or representative in congress, or elector of president or vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of the congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorised by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave ; but all such debts, obligations, and claims shall be held illegal and void.

5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of race, colour, or previous condition of servitude.

2. The congress shall have power to enforce this article by appropriate legislation.

THE BRITISH NORTH AMERICA ACT, 1867.

ANNO TRICESIMO ET TRICESIMO-PRIMO VICTORIÆ REGINÆ,

CAP. III.

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof, and for Purposes connected therewith.

[29th March, 1867.]

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom :

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire :

And whereas on the Establishment of the Union by Authority of Parliament, it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared :

And whereas it is expedient that Provision be made for the eventual admission into the Union of other Parts of British North America :

Be it therefore enacted and declared by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I.—PRELIMINARY.

Short Title.

1. This Act may be cited as the British North America Act, 1867.

Application of Provisions referring to the Queen.

2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

II.—UNION.

Declaration of Union.

3. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the name of Canada ; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.

Construction of subsequent Provisions of Act.

4. The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the Day appointed for the Union taking effect in the Queen's Proclamation ; and in the same Provisions, unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act.

5. Canada shall be divided into Four Provinces, named Ontario, Four Provinces. Quebec, Nova Scotia, and New Brunswick.

6. The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada, shall be deemed to be severed, and shall form Two Separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the part which formally constituted the Province of Lower Canada shall constitute the Province of Quebec. Provinces of Ontario and Quebec.

7. The Provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this Act. Provinces of Nova Scotia and New Brunswick.

8. In the General Census of the Population of Canada, which is hereby required to be taken in the year one thousand eight hundred and seventy-one, and in every tenth year thereafter, the respective populations of the four Provinces shall be distinguished. Decennial Census.

III.—EXECUTIVE POWER.

9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen. Declaration of Executive Power in the Queen.

10. The Provisions of this Act referring to the Governor-General extend and apply to the Governor-General for the time being of Canada, or other the Chief Executive Officer or Administrator for the time being carrying on the Government of Canada on behalf and in the name of the Queen, by whatever title he is designated. Application of Provisions referring to the Governor-General.

11. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and Members thereof may be from time to time removed by the Governor-General. Constitution of Privy Council of Canada.

12. All Powers, Authorities and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall as far as the same continue in existence and capable of being exercised after the Union, in relation to the Government of Canada, be vested in and exercisable by the Governor-General, with the advice, or with the advice and consent of or in conjunction with the Queen's Privy Council for Canada, or any members thereof, or by the Governor-General individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada. All Powers under Acts to be exercised by Governor-General with advice of Privy Council or alone

Application of
Provisions re-
ferring to
Governor-
General in
Council.

13. The Provisions of this Act, referring to the Governor-General in Council, shall be construed as referring to the Governor-General acting by and with the advice of the Queen's Privy Council for Canada.

Power to Her
Majesty to
authorise
Governor-
General to
appoint
Deputies.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorise the Governor-General from time to time to appoint any person or persons jointly or severally to be his Deputy or Deputies within any part or parts of Canada, and in that capacity to exercise during the pleasure of the Governor-General such of the powers, authorities, and functions of the Governor-General as the Governor-General deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen; but the appointment of such a Deputy or Deputies shall not affect the exercise by the Governor-General himself of any power, authority, or function.

Command of
Armed Forces
to continue to
be vested in the
Queen.

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

Seat of Govern-
ment of Canada.

16. Until the Queen otherwise directs, the seat of government of Canada shall be Ottawa.

IV.—LEGISLATIVE POWER.

Constitution of
Parliament of
Canada.

17. There shall be one Parliament for Canada, consisting of the Queen, and Upper House styled the Senate, and the House of Commons.

Privileges, &c.,
of Houses.

18. The Privileges, Immunities, and Powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act, held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

First Session of
the Parliament
of Canada.

19. The Parliament of Canada shall be called together not later than six months after the Union.

Yearly Session
of the Parlia-
ment of Canada.

20. There shall be a session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

The Senate.

Number of
Senators.

21. The Senate shall, subject to the provisions of this Act, consist of seventy-two members, who shall be styled Senators.

Representation
of Provinces in
Senate.

22. In relation to the constitution of the Senate, Canada shall be deemed to consist of Three Divisions :—

- (1.) Ontario ;
- (2.) Quebec ;
- (3.) The Maritime Provinces, Nova Scotia, and New Brunswick,

which three divisions shall (subject to the provisions of this Act) be equally represented in the Senate as follows : Ontario by twenty-four Senators ; Quebec by twenty-four Senators ; and the Maritime Provinces by twenty-four Senators, twelve thereof representing Nova Scotia, and twelve thereof representing New Brunswick.

† In the case of Quebec, each of the twenty-four Senators representing that Province shall be appointed for one of the twenty-four electoral divisions of Lower Canada specified in Schedule A, to Chapter One of the Consolidated Statutes of Canada.

23. The qualifications of a Senator shall be as follows :—

Qualifications
of Senator.

- (1.) He shall be of the full age of thirty years.
- (2.) He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalised by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union.
- (3.) He shall be legally or equitably seized as of Freehold for his own use and benefit of lands or tenements held in free and common soccage, or seized or possessed for his own use and benefit of lands or tenements held in franc-alieu, or in roture, within the Province for which he is appointed, of the value of four thousand dollars over and above all rents, dues, debts, charges, mortgages, and incumberances due or payable out of, or charged on or affecting the same ;
- (4.) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities.
- (5.) He shall be resident in the Province for which he is appointed.
- (6.) In the case of Quebec, he shall have his real property qualification in the electoral division for which he is appointed, or shall be resident in that division.

24. The Governor-General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate ; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a senator.

Summons of
Senator.

25. Such persons shall be first summoned to the Senate as the Queen by warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.

Summons of
First Body of
Senators.

26. If at any time, on the recommendation of the Governor-General, the Queen thinks fit to direct that three or six members be added to the Senate, the Governor-General may, by Summons to three or six qualified persons (as the case may be), representing equally the three divisions of Canada, add to the Senate accordingly.

Addition of
Senators in
certain cases.

27. In case of such addition being at any time made, the Governor-General shall not summon any person to the Senate, except on a further like Direction by the Queen on the like recom-

Reduction of
Senate to nor-
mal number.

mendation, until each of the three divisions of Canada is represented by twenty-four Senators, and no more.

Maximum number of Senators.

28. The number of Senators shall not at any time exceed seventy-eight.

Tenure of place in Senate.

29. A Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

Resignation of place in Senate.

30. A Senator may, by writing under his hand, addressed to the Governor-General, resign his place in the Senate, and thereupon the same shall be vacant.

Disqualification of Senators.

31. The place of a Senator shall become vacant in any of the following cases :—

- (1.) If for two consecutive sessions of the Parliament he fails to give his attendance in the Senate ;
- (2.) If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience or adherence to a Foreign Power, or does an act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen of a Foreign Power ;
- (3.) If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter ;
- (4.) If he is attainted of treason, or convicted of felony or any infamous crime ;
- (5.) If he ceases to be qualified in respect of property or of residence ; provided that a Senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the seat of Government of Canada while holding an office under the Government requiring his presence there.

Summons on vacancy in Senate.

32. When a vacancy happens in the Senate by resignation, death, or otherwise, the Governor-General shall, by summons to a fit and qualified person, fill the vacancy.

Questions as to qualifications and vacancies in Senate.

33. If any question arises respecting the qualification of a Senator or a vacancy in the Senate, the same shall be heard and determined by the Senate.

Appointment of Speaker of Senate.

34. The Governor-General may from time to time by instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead.

Quorum of Senate.

35. Until the Parliament of Canada otherwise provides, the presence of at least fifteen Senators, including the Speaker, shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Voting in Senate.

36. Questions arising in the Senate shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

Constitution of House of Commons in Canada,

The House of Commons.

37. The House of Commons shall, subject to the provisions of this Act, consist of one hundred and eighty-one members, of whom

eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick.

38. The Governor-General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon and call together the House of Commons.

Summoning of House of Commons.

39. A Senator shall not be capable of being elected, or of sitting or voting as a member of the House of Commons.

Senators not to sit in House of Commons.

40. Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia and New Brunswick shall, for the purposes of the election of members to serve in the House of Commons, be divided into electoral districts as follows :—

Electoral Districts of the four Provinces.

I.—*Ontario.*

Ontario shall be divided into the Counties, Ridings of Counties, Cities, parts of Cities, and Towns enumerated in the first schedule to this Act, each whereof shall be an electoral district, each such district as numbered in that schedule being entitled to return one member.

II.—*Quebec.*

Quebec shall be divided into sixty-five electoral districts, composed of the sixty-five electoral divisions into which Lower Canada is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of Canada, Chapter Seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the Twenty-third year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such electoral division shall be for the purposes of this Act an electoral district entitled to return one member.

III.—*Nova Scotia.*

Each of the eighteen counties of Nova Scotia shall be an electoral district. The county of Halifax shall be entitled to return two members, and each of the other counties one member.

IV.—*New Brunswick.*

Each of the fourteen counties into which New Brunswick is divided, including the city and county of St. John, shall be an electoral district. The city of St. John shall also be a separate electoral district. Each of those fifteen electoral districts shall be entitled to return one member.

41. Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union relative to the following matters or any of them, namely, the qualifications and disqualifications of persons to be elected to sit or vote as members of the House of Assembly or Legislative Assembly in the several Provinces, the voters at elections of such members, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which elections may be continued, the Trial of Controverted elections and proceedings incident thereto, the vacating of seats of members, and the execution of new writs, in case of seats vacated otherwise than by dissolution,—shall respectively apply to election of members

Continuance of existing Election Laws until Parliament of Canada otherwise provides.

to serve in the House of Commons for the same several Provinces.

Proviso as to
Algoma.

Provided that, until the Parliament of Canada otherwise provides, at any election for a member of the House of Commons for the district of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject, aged twenty-one years or upwards, being a householder, shall have a vote.

Writs for first
Election.

42. For the first election of members to serve in the House of Commons, the Governor-General shall cause writs to be issued by such person, in such form and addressed to such returning officers as he thinks fit.

The persons issuing writs under this section shall have the like powers as are possessed at the Union by the officers charged with the issuing of writs for the election of members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia or New Brunswick; and the returning officers to whom writs are directed under this section shall have the like powers as are possessed at the Union by the officers charged with the returning of writs for the election of members to serve in the same respective House of Assembly or Legislative Assembly.

As to Casual
Vacancies.

43. In case a vacancy in the representation in the House of Commons of any electoral district happens before the meeting of the Parliament, or after the meeting of the Parliament before provision is made by the Parliament in this behalf, the provisions of the last foregoing section of this Act shall extend and apply to the issuing and returning of a writ in respect of such vacant district.

As to Election
of Speaker of
House of
Commons.

44. The House of Commons, on its first assembling after a general election, shall proceed with all practicable speed to elect one of its members to be Speaker.

As to filling up
vacancy in office
of Speaker.

45. In case of a vacancy happening in the office of Speaker, by death, resignation, or otherwise, the House of Commons shall, with all practicable speed, proceed to elect another of its members to be Speaker.

Speaker to
preside.

46. The Speaker shall preside at all meetings of the House of Commons.

Provision in
case of absence
of Speaker.

47. Until the Parliament of Canada otherwise provides, in case of the absence, for any reason, of the Speaker from the Chair of the House of Commons for a period of forty-eight consecutive hours, the House may elect another of its members to act as Speaker, and the member so elected shall, during the continuance of such absence of the Speaker, have and execute all the powers, privileges and duties of Speaker.

Quorum of
House of
Commons.

48. The presence of at least twenty members of the House of Commons shall be necessary to constitute a meeting of the House for the exercise of its powers; and for that purpose the Speaker shall be reckoned as a member.

Voting in House
of Commons.

49. Questions arising in the House of Commons shall be decided by a majority of voices other than that of the Speaker, and when the voices are equal, but not otherwise, the Speaker shall have a vote.

50. Every House of Commons shall continue for five years from the day of the return of the Writs for choosing the House (subject to be sooner dissolved by the Governor-General), and no longer.

Duration of
House of
Commons.

51. On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four Provinces shall be readjusted by such authority, in such a manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules :—

Decennial
Readjustment of
Representation.

(1.) Quebec shall have the fixed number of sixty-five members

(2.) There shall be assigned to each of the other Provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained).

(3.) In the computation of the number of members for a Province, a fractional part not exceeding one-half of the whole number requisite for entitling the Province to a member shall be disregarded ; but a fractional part exceeding one-half of that number shall be equivalent to the whole number.

(4.) On any such re-adjustment the number of members for a Province shall not be reduced unless the proportion which the number of the population of the Province bore to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the Province is ascertained at the then latest census to be diminished by one-twentieth part or upwards.

(5.) Such readjustment shall not take effect until the termination of the then existing Parliament.

52. The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the province prescribed by this Act is not thereby disturbed.

Increase of
number of
House of
Commons.

Money Votes; Royal Assent.

53. Bills for appropriating any part of the public revenue, or for imposing any tax or impost shall originate in the House of Commons.

Appropriation
and Tax Bills.

54. It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose, that has not been first recommended to that House by message of the Governor-General in the session in which such vote, resolution, address, or bill is proposed.

Recommendation of money
votes.

55. Where a bill passed by the Houses of the Parliament is presented by the Governor-General for the Queen's Assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the bill for the signification of the Queen's pleasure.

Royal assent to
Bills, &c.

Disallowance
by Order in
Council of Act
assented to by
Governor-
General.

56. Where the Governor-General assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within two years after receipt thereof by the Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by speech or message to each of the Houses of Parliament or by Proclamation, shall annul the Act from and after the day of such signification.

Signification of
Queen's pleasure
on Bill reserved.

57. A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's Assent, the Governor-General signifies, by speech or message to each of the Houses of the Parliament or by Proclamation, that it has received the assent of the Queen in Council.

An entry of every such speech, message, or proclamation shall be made in the journal of each House, and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the Records of Canada.

V.—PROVINCIAL CONSTITUTIONS.

Executive Power.

Appointment of
Lieutenant-
Governors of
Provinces.

58. For each Province there shall be an officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by instrument under the Great Seal of Canada.

Tenure of office
of Lieutenant-
Governor.

59. A Lieutenant-Governor shall hold office during the pleasure of the Governor-General; but any Lieutenant-Governor appointed after the commencement of the first session of the Parliament of Canada shall not be removable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message to the Senate and to the House of Commons within one week thereafter if the Parliament is then sitting, and if not then, within one week after the commencement of the next session of the Parliament.

Salaries of
Lieutenant-
Governors.

60. The salaries of the Lieutenant-Governors shall be fixed and provided by the Parliament of Canada.

Oaths, &c., of
Lieutenant-
Governor.

61. Every Lieutenant-Governor shall, before assuming the duties of his office, make and subscribe before the Governor-General, or some person authorised by him, oaths of allegiance and office similar to those taken by the Governor-General.

Application of
provisions
referring to
Lieutenant-
Governor.

62. The provisions of this Act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the time being of each Province or other the Chief Executive Officer or Administrator for the time being carrying on the Government of the Province, by whatever title he is designated.

Appointment of
Executive
Officers for
Ontario and
Quebec

63. The Executive Council of Ontario and Quebec shall be composed of such persons as the Lieutenant-Governor from time to time thinks fit, and in the first instance of the following officers,

namely, the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with, in Quebec, the Speaker of the Legislative Council and the Solicitor-General.

64. The constitution of the executive authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union, until altered under the authority of this Act.

Executive Government of Nova Scotia and New Brunswick.

65. All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised, after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the advice, or with the advice and consent of, or in conjunction with the respective Executive Councils or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be abolished or altered by the respective Legislatures of Ontario and Quebec.

Powers to be exercised by Lieutenant-Governor of Ontario or Quebec, with advice or alone.

66. The provisions of this Act referring to the Lieutenant-Governor in Council shall be construed as referring to the Lieutenant-Governor of the Province acting by and with the advice of the Executive Council thereof.

Application of provisions referring to Lieutenant-Governor in Council.

67. The Governor-General in Council may from time to time appoint an administrator to execute the office and functions of Lieutenant-Governor during his absence, illness, or other inability.

Administration in absence, &c., of Lieutenant-Governor.

68. Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the seats of Government of the Provinces shall be as follows, namely,—of Ontario, the city of Toronto; of Quebec, the city of Quebec; of Nova Scotia, the city of Halifax; and of New Brunswick, the city of Fredericton.

Seats of Provincial Government.

Legislative Power.

I.—Ontario.

69. There shall be a Legislature for Ontario, consisting of the Lieutenant-Governor and of one house, styled the Legislative Assembly of Ontario.

Legislature for Ontario.

Electoral
Districts.

70. The Legislative Assembly of Ontario shall be composed of eighty-two members, to be elected to represent the eighty-two electoral districts set forth in the first schedule to this Act.

2.—Quebec.

Legislature for
Quebec.

71. There shall be a Legislature for Quebec, consisting of the Lieutenant-Governor and two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

Constitution of
Legislative
Council.

72. The Legislative Council of Quebec shall be composed of twenty-four members, to be appointed by the Lieutenant-Governor in the Queen's name by instrument under the Great Seal of Quebec, one being appointed to represent each of the twenty-four electoral divisions of Lower Canada in this Act referred to, and each holding office for the term of his life, unless the Legislature of Quebec otherwise provides under the provisions of this Act.

Qualification
of Legislative
Councillors.

73. The qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

Resignation,
Disqualification,
&c.

74. The place of a Legislative Councillor of Quebec shall become vacant in the cases, *mutatis mutandis*, in which the place of Senator becomes vacant.

Vacancies.

75. When a vacancy happens in the Legislative Council of Quebec by resignation, death, or otherwise, the Lieutenant-Governor, in the Queen's name, by instrument under the Great Seal of Quebec, shall appoint a fit and qualified person to fill the vacancy.

Questions as to
Vacancies, &c.

76. If any question arises respecting the qualification of a Legislative Councillor of Quebec, the same shall be heard and determined by the Legislative Council.

Speaker of
Legislative
Council.

77. The Lieutenant-Governor may from time to time, by instrument under the Great Seal of Quebec, appoint a member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his stead.

Quorum of
Legislative
Council.

78. Until the Legislature of Quebec otherwise provides, the presence of at least ten members of the Legislative Council, including the Speaker, shall be necessary to constitute a meeting for the exercise of its powers.

Voting in
Legislative
Council.

79. Questions arising in the Legislative Council of Quebec shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal, the decision shall be deemed to be in the negative.

Constitution of
Legislative
Assembly of
Quebec.

80. The Legislative Assembly of Quebec shall be composed of sixty-five members, to be elected to represent the sixty-five electoral divisions or districts of Lower Canada in this Act referred to, subject to alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant-Governor of Quebec for assent any bill for altering the limits of any of the electoral divisions or districts, and the assent shall not be given to such bill unless an address has been presented by the Legislative Assembly to the Lieutenant-Governor, stating that it has been so passed.

3.—*Ontario and Quebec.*

81. The Legislatures of Ontario and Quebec respectively shall be called together not later than six months after the Union. First Session of Legislatures.

82. The Lieutenant-Governor of Ontario and of Quebec shall, from time to time, in the Queen's name, by instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province. Summoning of Legislative Assemblies.

83. Until the Legislature of Ontario or of Quebec otherwise provides, a person accepting or holding in Ontario or in Quebec, any office, commission or employment, permanent or temporary, at the nomination of the Lieutenant-Governor, to which an annual salary, or any fee, allowance, emolument or profit of any kind or amount whatever from the Province is attached, shall not be eligible as a member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this section shall make ineligible any person being a member of the Executive Council of the respective Province, or holding any of the following offices, that is to say, the offices of Attorney-General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec, Solicitor-General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such office. Restriction of election of holders of offices.

84. Until the Legislatures of Ontario and Quebec respectively otherwise provide, all laws which at the Union are in force in those Provinces respectively, relative to the following matters or any of them, namely, the qualifications and disqualifications of persons to be elected or to sit or vote as members of the Assembly of Canada, the qualifications or disqualifications of voters, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which such elections may be continued, and the trial of controverted elections and the proceedings incident thereto, the vacating of the seats of members, and the issuing and execution of new writs in case of seats vacated otherwise than by dissolution, shall respectively apply to elections of members to serve in the respective Legislative Assemblies of Ontario and Quebec. Continuance of existing election laws.

Provided that until the Legislature of Ontario otherwise provides, at any election for the member of the Legislative Assembly of Ontario for the District of Algoma, in addition to persons qualified by the Law of the Province of Canada to vote, every male British subject aged twenty-one years or upwards, being a householder, shall have a vote.

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for four years from the day of the return of the writs for choosing the same (subject, nevertheless, to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant-Governor of the Province), and no longer. Duration of Legislative Assemblies.

86. There shall be a session of the Legislature of Ontario and of that of Quebec, once at least in every year, so that twelve months Yearly Session of Legislature.

shall not intervene between the last sitting of the Legislature in each Province in one session and its first sitting in the next session.

Speaker,
Quorum, &c.

87. The following provisions of this Act respecting the House of Commons of Canada, shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say,—the provisions relating to the election of a Speaker originally and on vacancies, the duties of the Speaker, the absence of the Speaker, the quorum, and to the mode of voting, as if those provisions were here re-enacted and made applicable in terms to each such Legislative Assembly.

4.—*Nova Scotia and New Brunswick.*

Constitutions of
Legislatures of
Nova Scotia and
New Brunswick.

88. The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act; and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected.

5.—*Ontario, Quebec, and Nova Scotia.*

First Elections.

89. Each of the Lieutenant-Governors of Ontario, Quebec, and Nova Scotia, shall cause writs to be issued for the first election of members of the Legislative Assembly thereof in such form and by such person as he thinks fit, and at such time addressed to such returning officer as the Governor-General directs, and so that the first election of a Member of Assembly for any electoral district or any subdivision thereof shall be held at the same time and at the same places as the election for a member to serve in the House of Commons of Canada for that electoral district.

6.—*The Four Provinces.*

Application to
Legislatures of
provisions re-
specting money
votes, &c.

90. The following provisions of this Act respecting the Parliament of Canada, namely—the provisions relating to Appropriation and Tax Bills, the recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen, and for a Secretary of State, of one year for two years, and of the Province for Canada.

VI. DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

Legislative
Authority of
Parliament of
Canada.

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act

assigned exclusively to the Legislatures of the Provinces ; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say :—

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The Raising of Money by any Mode or System of Taxation.
4. The Borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country, or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

Subjects of
exclusive
Provincial
Legislation.

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subject next hereinafter enumerated ; that is to say :—

1. The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.
2. Direct taxation within the Province in order to the raising of a revenue for provincial purposes.
3. The borrowing of money on the sole credit of the Province.
4. The establishment and tenure of provincial offices, and the appointment and payment of provincial officers.
5. The management and sale of public lands belonging to the Province, and of the timber and wood thereon.
6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province.
7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals.
8. Municipal institutions in the Province.
9. Shop, saloon, tavern, auctioneer, and other licences, in order to the raising of a revenue for provincial, local, or municipal purposes.
10. Local works and undertakings, other than such as are of the following classes—
 - a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings, connecting the province with any other or others of the provinces, or extending beyond the limits of the province
 - b. Lines of steamships between the Province and any British or foreign country.
 - c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the general advantage of two or more of the Provinces.
11. The incorporation of Companies with provincial objects.
12. Solemnization of marriage in the Province.
13. Property and civil rights in the Province.
14. The administration of justice in the Province, including the constitution, maintenance, and organisation of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.
16. Generally all matters of a merely local or private nature in the Province.

Education.

93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions :— Legislation respecting education.

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province of the Union ;
2. All the powers, privileges, and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and the school trustees of the Queen's Roman Catholic subjects, shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec ;
3. Where in any Province a system of separate or dissentient schools exist by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education ;
4. In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick.

94. Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the courts in those three Provinces, and from and after the passing of any Act in that behalf, the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted ; but any Act of the Parliament of Canada making provision for such uniformity, shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof. Legislation for uniformity of laws in Three Provinces.

Agriculture and Immigration.

95. In each Province the Legislature may make laws in relation to agriculture in the Province, and to immigration into the Province ; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all Concurrent powers of Legislation respecting agriculture, &c.

or any of the Provinces, and to immigration into all or any of the Provinces ; and any law of the Legislature of a Province, relative to agriculture or to immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

VII.—JUDICATURE.

Appointment of Judges.

96. The Governor-General shall appoint the judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of Judges in Ontario, &c.

97. Until the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and the procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor-General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of office of Judges of Superior Courts.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons.

Salaries, &c., of Judges.

100. The salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick) and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

General Court of Appeal, &c.

101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organisation of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada.

VIII. REVENUES ; DEBTS ; ASSETS ; TAXATION.

Creation of Consolidated Revenue Fund.

102. All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union, had and have power of Appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided.

Expenses of collection, &c.

103. The Consolidated Revenue Fund of Canada shall be permanently charged with costs, charges, and expenses incident to the collection, management, and receipt thereof, and the same shall form the first charge thereon, subject to be reviewed and audited in such manner as shall be ordered by the Governor-General in Council until the Parliament otherwise provides.

Interest of Provincial public debts.

104. The annual interest of the public debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the second charge on the Consolidated Revenue Fund of Canada,

105. Unless altered by the Parliament of Canada, the salary of the Governor-General shall be ten thousand pounds sterling money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the third charge thereon.

Salary of
Governor-
General.

106. Subject to the several payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the public service.

Appropriation
from time to
time.

107. All stocks, cash, bankers' balances, and securities for money belonging to each Province at the time of the Union, except as in this Act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the Provinces at the Union.

Transfer of
stocks, &c.

108. The public works and property of each Province enumerated in the third schedule to this Act shall be the property of Canada.

Transfer of
property in
Schedule.

109. All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trust existing in respect thereof, and to any interest other than that of the Province in the same.

Property in
lands, mines, &c.

110. All assets connected with such portions of the public debt of each Province as are assumed by that Province shall belong to that Province.

Assets connected
with Provincial
debts.

111. Canada shall be liable for the debts and liabilities of each Province existing at the Union.

Canada to be
liable for
Provincial debts.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the Union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Debts of Ontario
and Quebec.

113. The assets enumerated in the fourth schedule to this Act, belonging at the Union to the Province of Canada, shall be the property of Ontario and Quebec conjointly.

Assets of
Ontario and
Quebec.

114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Debt of Nova
Scotia.

115. New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Debt of New
Brunswick.

116. In case the public debts of Nova Scotia and New Brunswick do not at the Union amount to eight million and seven million dollars respectively, they shall respectively receive, by half-yearly payments in advance from the Government of Canada, interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

Payment of
interest to Nova
Scotia and New
Brunswick.

Provincial public
property.

117. The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.

Grant to
Province.

118. The following sums shall be paid yearly by Canada to the several Provinces for the support of their Government and Legislature :

						Dollars.
Ontario	..	..	..	..	..	Eighty thousand.
Quebec	..	..	..	..	..	Seventy thousand.
Nova Scotia	..	..	..	..	..	Sixty thousand.
New Brunswick	..	..	..	..	..	Fifty thousand.

Two hundred and sixty thousand.

and an annual grant in aid of each Province shall be made, equal to eighty cents per head, of the population as ascertained by the census of one thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two Provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grant shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each Province : but the Government of Canada shall deduct from such grants, as against any Province, all sums chargeable as interest on the public debt of that Province in excess of the several amounts stipulated in this Act.

Further grant to
New Brunswick.

119. New Brunswick shall receive, by half-yearly payments in advance from Canada, for the period of ten years from the Union, an additional allowance of sixty-three thousand dollars per annum ; but as long as the public debt of that Province remains under seven million dollars, a deduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of sixty-three thousand dollars.

Form of
payments.

120. All payments to be made under this Act, or in discharge of liabilities created under any Act of the Provinces of Canada, Nova Scotia, and New Brunswick respectively, and assumed by Canada, shall until the Parliament of Canada otherwise direct, be made in such form and manner as may from time to time be ordered by the Governor-General in Council.

Canadian
manufactures,
&c.

121. All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Continuance of
Customs and
Excise Laws.

122. The Customs and Excise Laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament in Canada.

Exportation and
Importation as
between Two
Provinces.

123. Where Customs duties are, at the Union, leviable on any goods, wares, or merchandises in any two Provinces, those goods, wares and merchandises may, from and after the Union, be imported from one of those Provinces into the other of them, on proof of payment of the Customs duty leviable thereon in the Province

of exportation, and on payment of such further amount (if any) of Customs duty as is leviable thereon in the Province of importation.

124. Nothing in this Act shall affect the right of New Brunswick to levy the lumber dues provided in chapter fifteen of title three of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the amount of dues; but the lumber of any of the Provinces other than New Brunswick shall not be subject to such dues. Lumber dues in New Brunswick.

125. No lands or property belonging to Canada or any Province shall be liable to taxation. Exemption of public lands, &c.

126. Such portions of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick had, before the Union, power of appropriation, as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each Province form one Consolidated Revenue Fund to be appropriated for the public service of the Province. Provincial Consolidated Revenue Fund.

IX.—MISCELLANEOUS PROVISIONS.

General.

127. If any person, being, at the passing of this Act, a member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a place in the Senate is offered, does not within thirty days thereafter, by writing under his hand, addressed to the Governor-General of the Province of Canada, or to the Lieutenant-Governor of Nova Scotia, or New Brunswick (as the case may be), accept the same, he shall be deemed to have declined the same; and any person who, being at the passing of this Act a member of the Legislative Council of Nova Scotia or New Brunswick, accepts a place in the Senate, shall thereby vacate his seat in such Legislative Council. As to Legislative Councillors of Provinces becoming Senators.

128. Every member of the Senate or House of Commons of Canada shall, before taking his seat therein, take and subscribe before the Governor-General or some person authorised by him, and every member of a Legislative Council or Legislative Assembly of any Province shall, before taking his seat therein, take and subscribe before the Lieutenant-Governor of the Province, or some person authorised by him, the oath of allegiance contained in the fifth schedule to this Act; and every member of the Senate of Canada and every member of the Legislative Council of Quebec shall also, before taking his seat therein, take and subscribe before the Governor-General, or some person authorised by him, the declaration of qualification contained in the same schedule. Oaths of allegiance, &c.

129. Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the Union, shall continue, in Ontario, Quebec, Nova Scotia, and New Brunswick, respectively, as if the Union had not been made; subject nevertheless (except Continuance of existing laws, courts, officers, &c.

with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act.

Transfer of
officers to
Canada.

130. Until the Parliament of Canada otherwise provides, all officers of the several Provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces, shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities, and penalties, as if the Union had not been made.

Appointment of
new officers.

131. Until the Parliament of Canada otherwise provides, the Governor-General in Council may from time to time appoint such Officers as the Governor-General in Council deems necessary or proper for the effectual execution of this Act.

Treaty
obligations.

132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

Use of English
and French
languages.

133. Either the English or the French language may be used by any person in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective records and journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

Ontario and Quebec

Appointment of
executive officers
for Ontario and
Quebec.

134. Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant-Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following officers to hold office during pleasure, that is to say,—the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and, in the case of Quebec, the Solicitor-General, and may, by order of the Lieutenant-Governor in Council from time to time prescribe the duties of those officers and of the several departments over which they shall preside, or to which they shall belong, and of the officers and clerks thereof, and may also appoint other and additional officers to hold office during pleasure, and may from time to time prescribe the duties of those officers, and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof.

135. Until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities, or authorities at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works and Minister of Agriculture and Receiver-General, by any law, statute, or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the duties and functions of the office of Minister of Agriculture at the passing of this Act imposed by the law of the Province of Canada as well as those of the Commissioner of Public Works.

Powers, duties &c., of executive officers.

136. Until altered by the Lieutenant-Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same or of the same design as those used in the Provinces of Upper Canada and Lower Canada respectively before their union as the Province of Canada

Great Seals.

137. The words "and from thence to the end of the next ensuing session of the Legislature," or words to the same effect used in any temporary Act of the Province of Canada not expired before the union, shall be construed to extend and apply to the next session of the Parliament of Canada, if the subject-matter of the Act is within the powers of the same as defined by this Act, or to the next sessions of the Legislatures of Ontario and Quebec respectively, if the subject-matter of the Act is within the powers of the same as defined by this Act.

Construction of temporary Acts

138. From and after the union, the use of the words "Upper Canada" instead of "Ontario," or "Lower Canada" instead of "Quebec," in any deed, writ, process, pleading, document, matter, or thing shall not invalidate the same.

As to errors in names.

139. Any proclamation under the Great Seal of the Province of Canada, issued before the Union, to take effect at a time which is subsequent to the Union, whether relating to that Province or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed, shall be and continue of like force and effect as if the Union had not been made

As to issue of Proclamations before Union, to commence after Union.

140. Any proclamation which is authorised by any Act of the Legislature of the Province of Canada, to be issued under the Great Seal of the Province of Canada, whether relating to that Province or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant-Governor of Ontario or of Quebec, as its subject-matter requires, under the Great Seal thereof; and from and after the issue of such proclamation, the same and the several matters and things therein proclaimed, shall be and continue of the like force and effect in Ontario or Quebec as if the Union had not been made

As to issue of Proclamations after Union.

Penitentiary.

141. The penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the penitentiary of Ontario and of Quebec.

Arbitration
respecting debts,
&c.

142. The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada, and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or Quebec.

Division of
records.

143. The Governor-General in Council may from time to time, order that such and so many of the records, books, and documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the property of that Province; and any copy thereof or extract therefrom, duly certified by the officer having charge of the original thereof, shall be admitted as evidence.

Constitution of
townships in
Quebec.

144. The Lieutenant-Governor of Quebec may from time to time, by proclamation under the Great Seal of the Province, to take effect from a day to be appointed therein, constitute townships in those parts of the Province of Quebec in which townships are not then already constituted and fix the metes and bounds thereof.

X.—INTERCOLONIAL RAILWAY.

Duty of
Government and
Parliament of
Canada to make
railway herein
described.

145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a declaration that the construction of the intercolonial railway is essential to the consolidation of the union of British North America, and to the assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that provision should be made for its immediate construction by the Government of Canada: Therefore, in order to give effect to that agreement, it shall be the duty of the Government and Parliament of Canada to provide for the commencement, within six months after the Union, of a railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the construction thereof without intermission, and the completion thereof with all practicable speed

XI.—ADMISSION OF OTHER COLONIES.

Powers to admit
Newfoundland,
&c., into the
Union.

146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such terms and conditions in each case as are

in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act ; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

147. In case of the admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a representation, in the Senate of Canada, of four members, and (notwithstanding anything in this Act) in case of the admission of Newfoundland, the normal number of Senators shall be seventy-six and their maximum number shall be eighty-two ; but Prince Edward Island, when admitted, shall be deemed to be comprised in the third of the three divisions into which Canada is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the representation of Nova Scotia and New Brunswick in the Senate shall, as vacancies occur, be reduced from twelve to ten members respectively, and the representation of each of those Provinces shall not be increased at any time beyond ten, except under the provisions of this Act, for the appointment of three or six additional Senators under the direction of the Queen.

As to representation of Newfoundland and Prince Edward Island in Senate.

THE FEDERAL CONSTITUTION OF GERMANY.

*[This translation of the German Constitution is that
published by the University of Pennsylvania.]*

LAW CONCERNING THE CONSTITUTION OF THE GERMAN EMPIRE OF THE 16TH APRIL, 1871

¶ We, William, by the Grace of God, German Emperor, King of Prussia, etc., hereby ordain, in the name of the German Empire, and with the consent of the Federal Council and Diet, what follows :

§ 1. The appended Constitution of the German Empire takes the place of the "Constitution of the German Confederation," agreed upon by the North German Confederation and the Grand Duchies of Baden and Hesse, as well as the place of the treaties concluded on the 23 and 25 November, 1870, with the Kingdoms of Bavaria and Wurtemberg, concerning their adhesion to the aforesaid "Constitution of the German Confederation."

§ 2. The provisions in Article 80 of the aforesaid Constitution of the German Confederation, and in III., § 8 of the Treaty of November 23, 1870, with Bavaria, and in Article 2, Number 6, of the Treaty with Wurtemberg of November 25, 1870, concerning the introduction into these States of the Laws passed by the North German Confederation, remain in force.

The there mentioned laws are laws of the Empire. Wherever mention is made in the same of the North German Confederation, its Constitution, territory, members or States, citizenship, constitutional organs, subjects, officers, flag, etc., the German Empire and its corresponding relations are to be understood.

The same thing is true of those laws adopted in the North German Confederation, which may be introduced in the future within any of the States mentioned.

§ 3. The agreements in the protocols accepted at Versailles, November 15, 1870 ; in the negotiations at Berlin of November 25, 1870, and in the final protocol of November 23, 1870, as well as those under IV. in the treaty with Bavaria of the 23 November, 1870, are not affected by this law.

Given at Berlin, April 16, 1871 }

[L. S.]

WILHELM,

PRINCE VON BISMARCK

THE IMPERIAL CONSTITUTION.

His Majesty the King of Prussia, in the name of the North German Confederation, His Majesty the King of Bavaria, His Majesty the King of Wurtemberg, His Royal Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse and by Rhine for those parts of the Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same as well as for the promotion of the welfare of the German people. This Confederation shall bear the name of the German Empire, and shall have the following Constitution :

I.—TERRITORY.

Article 1. The territory of the Confederation shall consist of the States of Prussia (with Lauenburg), Bavaria, Saxony, Wurtemberg, Baden, Hesse, Mecklenburg-Schwerin, Saxe-Weimar, Mecklenburg-Strelitz, Oldenburg, Brunswick, Saxe-Meiningen, Saxe-Altenburg, Saxe-Coburg-Gotha, Anhalt, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Waldeck, Reuss (elder branch), Reuss (younger branch), Schaumburg-Lippe, Lippe, Lubeck, Bremen and Hamburg.

II.—LEGISLATION OF THE EMPIRE.

Article 2. Within this territory the Empire shall exercise the right of legislation according to the provisions of this Constitution ; and the laws of the Empire shall take precedence of those of each individual State. The laws of the Empire shall be rendered binding by Imperial proclamation, such proclamation to be published in a journal devoted to the publication of the laws of the Empire (*Reichsgesetzblatt*—Imperial Gazette). If no other period shall be designated in the published law for it to take effect, it shall take effect on the fourteenth day after its publication in the "Imperial Gazette" at Berlin.

Article 3. There shall be a common citizenship (*Indigenat*) for all Germany, and the members (citizens or subjects) of each State of the Confederation shall be treated in every other State thereof as natives, and shall consequently have the right of becoming permanent residents ; of carrying on business ; of filling public offices ; of acquiring real estate ; of obtaining citizenship, and of enjoying all other civil rights on the same conditions as those born in the State, and shall also have the same usage as regards civil and criminal prosecutions and the protection of the laws.

No German shall be limited in the exercise of this privilege by the authorities of his native State, or by the authorities of any other State of the Confederation.

The regulations governing the care of paupers, and their admission into the various local unions, shall not, however, be affected by the principle enunciated in the first paragraph.

In like manner those treaties shall remain in force which have been concluded between the various States of the Confederation

in relation to the custody of persons who are to be expelled, the care of sick and the burial of deceased citizens.

With regard to the performance of military service in the various States, the necessary laws will be passed hereafter by the Empire.

All Germans in foreign countries shall have equal claims upon the protection of the Empire.

Article 4. The following matters shall be under the supervision and legislative control of the Empire :

1. Regulations relating to migration within the Empire ; matters of domicile and settlement ; the right of citizenship ; the issuing and examination of passports ; surveillance of foreigners ; trade and industry, including insurance, so far as these matters are not already provided for by Article 3 of this Constitution (in Bavaria, however, exclusive of matters relating to domicile and settlement), and finally matters relating to colonisation and emigration to foreign countries.

2. Legislation concerning customs-duties, commerce, and such taxes as are to be applied to the uses of the Empire.

3. Regulation of weights and measures ; of the coinage ; and of the emission of " funded and unfunded " paper money.*

4. General banking regulations.

5. Patents for inventions.

6. The protection of intellectual property.

7. The organisation of a general system of protection for German trade in foreign countries ; of German navigation, and of the German flag on the high seas ; likewise the organisation of a general consular representation to be maintained by the Empire.

8. Railway matters (subject in Bavaria to the provisions of Article 46), and the construction of land and water ways for the purposes of public defence, and of general commerce.

9. Rafting and navigation upon those water ways which are common to several States, and the condition of such waters ; also the river and other water dues.

10. Postal and telegraph affairs ; but in Bavaria and Wurtemberg these shall be subject to the provisions of Article 52.

11. Regulations concerning the reciprocal execution of judicial sentences in civil matters, and the fulfilment of requisitions in general.

12. The authentication of public documents.

13. General legislation with respect to the law of obligations and notes ; and to criminal and commercial law, including legal procedure.†

14. The Imperial military and naval establishment.

15. Police regulation as to medical and veterinary matters.

16. Laws relating to the Press, and to the right of association.

* "Funded and unfunded" seems intended to include banknotes and paper money. The terms in German are not precise. See Wagner's *Zettlebankpolitik*, p. 10 A.

† Amended December 20, 1873, to read : Uniform legislation as to the whole domain of civil and criminal law, including legal procedure.

Article 5. The legislative power of the Empire shall be exercised by the Federal Council and the Diet (*Reichstag*). A majority of the votes of both bodies shall be necessary and sufficient for the passage of a law.

When a law is proposed in relation to the army, or navy, or to the imposts specified in Article 35, the vote of the *presidium** shall decide in case of a difference of opinion in the Federal Council, if said vote be in favour of the retention of existing arrangements.

III.—FEDERAL COUNCIL.

Article 6. The Federal Council shall consist of the representatives of the members of the Confederation, among which the votes shall be divided in such manner as that Prussia (including the former votes of Hanover, the Electorate of Hesse, Holstein, Nassau and Frankfort) shall have 17 votes; Bavaria, 6 votes; Saxony, 4 votes; Wurtemberg, 4 votes; Baden, 3 votes; Hesse, 3 votes; Mecklenburg-Schwerin, 2 votes; Saxe-Weimar, 1 vote; Mecklenburg-Strelitz, 1 vote; Oldenburg, 1 vote; Brunswick, 2 votes; Saxe-Meiningen, 1 vote; Saxe-Altenburg, 1 vote; Saxe-Coburg-Gotha, 1 vote; Anhalt, 1 vote; Schwarzburg-Rudolstadt, 1 vote; Schwarzburg-Sondershausen, 1 vote; Waldeck, 1 vote; Reuss (elder branch), 1 vote; Reuss (younger branch), 1 vote; Schaumburg-Lippe, 1 vote; Lippe, 1 vote; Lubeck, 1 vote; Bremen, 1 vote; Hamburg, 1 vote; total, 58 votes. Each member of the Confederation may appoint as many delegates to the Federal Council as it has votes, but the votes of each State must be cast as a unit.

Article 7. The Federal Council shall take action upon—

1. The measures to be proposed to the Diet, and the resolutions passed by the same.

2. The general provisions and arrangements necessary for the execution of the laws of the Empire, so far as no other provision is made by law.

3. The defects which may be discovered in the execution of the laws of the Empire, or of the provisions and arrangements heretofore mentioned.

Each member of the Confederation shall have the right to make propositions and introduce motions, and it shall be the duty of the *presidium* to submit them for deliberation.

Legislative action shall take place by simple majority, with the exceptions of the provisions in Articles 5, 37 and 78. Votes not represented or not instructed shall not be counted. In the case of a tie, the vote of the *presidium* shall decide.

When legislative action is taken upon a subject which, according to the provisions of this Constitution, does not concern the whole Empire, the votes only of those States of the Confederation interested in the matter in question shall be counted.

Article 8. The Federal Council shall appoint from its own members Permanent Committees :

* *i.e.* Prussia.

1. On the army and the fortifications.
2. On marine affairs.
3. On duties and taxes.
4. On commerce and trade.
5. On railroads, posts and telegraphs.
6. On affairs of justice.
7. On accounts.

In each of these Committees there shall be representatives of at least four States of the Confederation, besides the *presidium*, and each State shall be entitled to only one vote in the same. In the Committee on the army and fortifications, Bavaria shall have a permanent seat; the remaining members of it, as well as the members of the Committee on marine affairs, shall be appointed by the Emperor; the members of the other Committees shall be elected by the Federal Council. These Committees shall be newly formed at each session of the Federal Council, *i.e.*, each year. The retiring members shall, however, again be eligible.

There shall also be appointed in the Federal Council a Committee on Foreign Affairs, over which Bavaria shall preside, to be composed of the plenipotentiaries of the Kingdoms of Bavaria, Saxony and Wurtemberg, and of two plenipotentiaries of other States of the Empire, who shall be elected annually by the Federal Council.

The necessary employés and officials shall be placed at the disposal of the Committees.

Article 9. Each member of the Federal Council shall have the right to appear in the Diet, and be heard there at any time he shall so request, to represent the views of his Government, even when the same shall not have been adopted by the majority of the Council. No one shall be at the same time a member of the Federal Council and of the Diet.

Article 10. The Emperor shall afford the customary diplomatic protection to the members of the Federal Council.

IV.—THE PRESIDENCY.

Article 11. To the King of Prussia shall belong the Presidency of the Confederation, and he shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war and conclude peace in the name of the same, enter into alliances and other conventions with foreign countries, accredit ambassadors and receive them.

For a declaration of war in the name of the Empire, the consent of the Federal Council shall be required, except in case of an attack upon the territory of the Confederation or its coasts.

So far as treaties with foreign countries refer to matters which, according to Article 4, are to be regulated by Imperial legislation, the consent of the Federal Council shall be required for their conclusion, and the approval of the Diet shall be necessary to render them valid.

Article 12. The Emperor shall have the right to convene the Federal Council and the Diet, and to open, adjourn and close them.

Article 13. The convocation of the Federal Council and the Diet shall take place annually, and the Federal Council may be called together for the preparation of business without the Diet; the latter, however, shall not be convoked without the Federal Council.

Article 14. The convocation of the Federal Council shall take place whenever demanded by one-third of the total number of votes.

Article 15. The Chancellor of the Empire, to be appointed by the Emperor, shall preside in the Federal Council, and supervise the conduct of its business.

The Chancellor of the Empire shall have the right to delegate the power to represent him to any member of the Federal Council. This delegation must be made in writing.

Article 16. The necessary bills shall be laid before the Diet in the name of the Emperor, in accordance with the resolutions of the Federal Council, and these shall be advocated in the Diet by members of the Federal Council, or by special commissioners appointed by the said Council.

Article 17. It shall be the duty of the Emperor to prepare and publish the laws of the Empire, and to supervise their execution. The decrees and ordinances of the Emperor shall be made in the name of the Empire, and require for their validity the signature of the Imperial Chancellor, who thereby takes upon himself the responsibility for them.

Article 18. The Emperor shall appoint Imperial officials, require them to take the oath of allegiance to the Empire, and dismiss them when necessary.

Officials of any one of the States of the Confederation, who shall be appointed to any Imperial office, shall enjoy the same rights as those to which they are entitled in their native States by virtue of their official position, provided no other legislative provision shall have been made previous to their entrance into the service of the Empire.

Article 19. If the States of the Confederation do not fulfil their Constitutional duties, they may be compelled to do so by "execution." This "execution" shall be ordered by the Federal Council, and carried out by the Emperor.

V.—THE DIET (REICHSTAG).

Article 20. The members of the Diet shall be chosen in a general election and by direct secret ballot.

Until regulated by the law, which according to Section 5 of the Election Law of May 31, 1869, is to be promulgated, 48 deputies shall be elected in Bavaria, 17 in Wurtemberg, 14 in Baden, 6 in Hesse, south of the River Main, and the total number shall consequently be 397.*

Article 21. Government officials shall not require leave of absence in order to enter the Diet.

* Including, that is to say, those deputies returned by the States of the North German Confederation. Fifteen members are elected from Alsace-Lorraine.

When a member of the Diet accepts a salaried office of the Empire, or a salaried office in one of the States of the Confederation, or accepts any office of the Empire or of a State involving higher rank or salary, he shall forfeit his seat and vote in the Diet, but may recover his place in the same by a new election.

Article 22. The proceedings of the Diet shall be public.

Truthful reports of the proceedings of the public sessions of the Diet shall subject those making them to no responsibility.

Article 23. The Diet shall have the right to propose laws within the jurisdiction of the Empire, and to refer petitions, addressed to it, to the Federal Council or the Chancellor of the Empire.

Article 24. The Diet shall be elected for five years * It may be dissolved during that time by a resolution of the Federal Council, with the consent of the Emperor.

Article 25. In the case of a dissolution of the Diet, new elections shall take place within a period of sixty days, and the Diet shall be called together within a period of ninety days after its dissolution.

Article 26. Unless by consent of the Diet, an adjournment of that body shall not exceed the period of thirty days, and shall not be repeated during the same session without such consent.

Article 27. The Diet shall examine into the legality of the election of its members and decide thereon. It shall regulate its mode of transacting business, as well as its own discipline, by establishing rules therefor, and elect its president, vice-presidents and secretaries.

Article 28. The Diet shall take action by absolute (simple) majority. To render action valid, the presence of a majority of the statutory number of members shall be required.

In matters which according to this Constitution do not concern the entire Empire, only such members shall vote as are elected from States whose interests are affected by the proposition. (Repealed by Act of February 24, 1873.)

Article 29. The members of the Diet are the representatives of the people as a whole, and shall not be bound by orders and instructions from their constituents.

Article 30. No member of the Diet shall at any time suffer legal or disciplinary prosecution on account of his vote, or on account of utterances made while in the performance of his functions, or be held responsible outside the Diet for his course within it.

Article 31. Without the consent of the Diet, none of its members shall be tried or arrested during the session for any penal offence committed, except when arrested in the act of committing the offence, or in the course of the following day.

The same rule shall apply in the case of arrests for debt

At the request of the Diet, all criminal proceedings instituted against one of its members, and likewise detention or arrest, shall be suspended during its session.

* Article 24 amended, from three to five years, March 19, 1888.

Article 32. The members of the Diet shall not be allowed to draw any salary, or be compensated as such.

VI.—CUSTOMS AND COMMERCE.

Article 33. Germany shall form a Customs and Commercial Union, having a common frontier for the collection of duties. Such territories as cannot, by reason of their situation, be suitably embraced within the said frontier, shall be excluded.

It shall be lawful to introduce all articles of commerce of any State of the Confederation into any other State of the Confederation without paying any impost thereon, except as far as similar articles are subject to internal taxation therein.

Article 34. The Hanseatic cities, Bremen and Hamburg, shall remain free ports outside of the common boundary of the Customs Union, retaining for that purpose a suitable district of their own, or of the surrounding territory, until they shall request to be admitted into the said Union.

Article 35. The Empire shall have the exclusive power to legislate concerning everything relating to the customs : to the taxation of salt and tobacco manufactured or raised in the territory of the Confederation ; to the taxation of domestic brandy and beer, and of sugar and syrup prepared from beets or other domestic products. It shall have exclusive power to legislate concerning the mutual protection (against fraud) of all taxes upon articles of consumption levied in the several States of the Empire, as well as concerning the measures which are required in the territory, outside the customs lines, for the security of the common customs frontier.

In Bavaria, Wurtemberg, and Baden, the matter of imposing duties on domestic brandy and beer is reserved for the legislation of each State. The States of the Confederation shall, however, endeavour to bring about uniform legislation regarding the taxation of these articles also.

Article 36. The administration and collection of customs duties and of the excise on articles of consumption (Article 35) is left to each State of the Confederation within its own territory, so far as this has been done by each State heretofore.

To ensure observance of Imperial law by the State administration, the Emperor shall [after consulting the committee of the Federal Council on customs and revenues] appoint certain Imperial officers in the customs or excise offices of the several States.

Reports made by these officials as to defects in the execution of the laws of the Empire (Article 35) shall be submitted to the Federal Council for action.

Article 37. In taking action upon the rules and regulations for the execution of the laws of the Empire (Article 35), the vote of the *presidium* shall decide whenever it shall pronounce for upholding the existing rule or regulation.

Article 38. The amounts accruing from customs and from the other revenues designated in Article 35, so far as the latter are subject to Imperial legislation, shall go to the treasury of the Empire.

This amount is made up of the total receipts from the customs and other revenues, after deducting therefrom—

1. Tax rebates and reductions in conformity with existing laws or general administrative regulations.
2. Reimbursements for taxes unlawfully collected.
3. The costs of collection and administration, viz. :
 - a. In the department of customs, the costs which are required for the protection and collection of customs on the frontiers and in the frontier districts.
 - b. In the department of the duty on salt, the costs which are used for the pay of the officers charged with collecting and controlling this duty in the salt works.
 - c. In the department of taxes on beet sugar and tobacco, the compensation which is to be allowed, according to the rules of the Federal Council, to the several State Governments for the cost of managing these duties and taxes.
 - d. Fifteen per cent. of the total receipts from other taxes.

The territories situated outside of the common customs-frontier shall contribute to the expenses of the Empire by paying an *aversum* (lump sum, or sum of acquittance).

Bavaria, Wurtemberg and Baden shall not share in the revenues from duties on brandy and beer, which go into the Treasury of the Empire, nor in the corresponding portion of the aforesaid *aversum*.

Article 39. The quarterly summaries to be regularly made by the revenue officers of the Federal States at the end of every quarter, and the final statement (to be made at the end of the year, and after the closing of the account-books) of the receipts which have become due in the course of the quarter, or during the fiscal year, from customs and from the other revenues which (according to Article 38) belong to the Treasury of the Empire, shall be arranged by the administrative officers of the various States, after a preliminary audit, in general summaries, in which the result of every impost is to be shown separately; these summaries shall be transmitted to the Committee of Audit of the Federal Council.

The latter (taking as a basis these summaries) fixes provisionally every three months the amount due to the Treasury of the Empire from the Treasury of each State, and it shall inform the Federal Council and the Federal States of the amount so fixed; furthermore, it shall submit to the Federal Council annually the final statement of these amounts with its remarks. The Federal Council shall take action upon the work of the Committee

Article 40. The terms of the Customs-Union Treaty of July 8, 1867, remain in force, so far as they have not been altered by the provisions of this Constitution, and as long as they are not altered in the manner designated in Articles 7 or 78.

VII.—RAILWAYS.

Article 41. Railways, which are considered necessary for the defence of Germany, or in the interest of general commerce, may

by Imperial law be constructed at the cost of the Empire, even in opposition to the will of those members of the Union through whose territory the railroads run, without prejudice, however, to the sovereign rights of that country ; or private persons may be charged with their construction, and receive rights of expropriation.

Every existing railway company is bound to permit new railroad lines to be connected with it, at the expense of the latter.

All laws granting existing railway companies the right of injunction against the building of parallel or competitive lines are hereby abolished throughout the Empire, without detriment to rights already acquired. Such rights of injunction cannot be granted in concessions to be given hereafter.

Article 42. The Governments of the Federal States bind themselves in the interest of general commerce, to have the German railways managed as one system, and for this purpose to have all new lines constructed and equipped according to a uniform plan.

Article 43. Accordingly, as soon as possible, uniform arrangements as to management shall be made, and especially shall uniform regulations be adopted for the police of the railroads. The Empire shall take care that the various railway administrations keep the roads always in such condition as is required for public security, and that they be equipped with such rolling stock as the wants of trade demand.

Article 44. Railway companies are bound to run as many passenger trains of suitable velocity as may be required for through traffic, and for the establishment of harmony between time-tables : also to make provision for such freight trains as may be necessary for the wants of trade, and to organise a system of through booking both in passenger and freight traffic, permitting the trains to go from one road to the other for the usual remuneration.

Article 45. The Empire shall have control over the tariff of charges. It shall endeavour to cause—

1. Uniform regulations to be speedily introduced on all German railway lines.

2. The tariff to be reduced and made uniform as far as possible, and particularly to secure low long distance rates for the transport of coal, coke, wood, minerals, stone, salt, crude iron, manure, and similar articles, as demanded by the interests of agriculture and industry. It shall endeavour in the first instance to introduce a one pfennig tariff as soon as practicable.

Article 46. In case of public distress, especially in case of an extraordinary rise in the price of provisions, it shall be the duty of the railway companies to adopt temporarily a low special tariff suited to the circumstances, which shall be fixed by the Emperor, on motion of the competent committee of the Federal Council, for the forwarding of grain, flour, vegetables and potatoes. This tariff shall, however, not be less than the lowest rate for raw produce existing on the said line.

The foregoing provisions, and those of Articles 42 to 45, shall not apply to Bavaria.

The Imperial Government, however, has the power, with regard to Bavaria also, to prescribe by means of legislation uniform rules for the construction and equipment of such railways as may be of importance for the defence of the country.

Article 47. The managers of all railways shall be required to obey, without hesitation, requisitions made by the authorities of the Empire for the use of their roads for the defence of Germany. In particular shall troops, and all material of war, be forwarded at uniform reduced rates.

VIII.—POST AND TELEGRAPH.

Article 48. The post and telegraph system shall be organised on a uniform plan, and managed as State institutions throughout the German Empire. The legislation of the Empire in regard to post and telegraph affairs, provided for in Article 4, shall not extend to those matters whose control is left to governmental ordinance or administrative regulation, according to the principles which have prevailed in the North German administration of post and telegraph.

Article 49. The receipts from post and telegraph throughout the Empire shall belong to a common fund. The expense shall be paid from the general receipts. The surplus goes into the Imperial Treasury. (Section 12.)

Article 50. The Emperor has the supreme supervision of the administration of post and telegraph. The authorities pension shall be paid from the general receipts. The surplus shall be so employed that uniformity be established and maintained in the organisation of the administration and in the transaction of business, as also in regard to the qualifications of employees.

The Emperor shall have the power to issue governmental ordinances and general administrative regulations, to issue general instructions, and also the exclusive right to regulate the relations which are to exist between the post and telegraph offices of Germany and those of other countries.

It shall be the duty of all officers of the Post Office and Telegraph Department to obey the orders of the Emperor. This obligation shall be included in their oath of office.

The appointment of such superior officers as shall be required for the administration of the post and telegraph in the various districts, such as directors, counsellors, and superintendents; also the appointment of officers of the post and telegraph acting in the capacity of supervisors for the aforesaid authorities in the several districts, such as inspectors or controllers, shall be made throughout the Empire by the Emperor, to whom they shall take the oath of office. The Governments of the several States shall receive timely notice of the aforementioned appointments, as far as they may relate to their territories, so that they may confirm and publish them.

Other officials required in the administration of the post and telegraph, as also all officials employed for local and technical purposes, including therefore all subordinate officials in the office, shall be appointed by the respective Governments of the States.

Where there is no independent State administration of post or telegraph, the terms of the various treaties are to be enforced.

Article 51. In consideration of the differences which have heretofore existed in the net receipts of the Post Office Departments of the several districts, and for the purpose of securing a suitable equalisation during the period of transition below named, the following procedure is to be observed in assigning the surplus of the Post Office Department to the Treasury of the Empire for general purposes. (Article 49.)

From the postal surpluses which accumulated in the several postal districts during the five years from 1861 to 1865, a yearly average shall be computed, and the share which every separate postal district has had in the surplus resulting therefrom for the whole territory of the Empire shall be expressed in a percentage.

In accordance with the ratio thus ascertained, the several States shall be accredited on the account of their other contributions to the expenses of the Empire, with their quota accruing from the postal surplus in the Empire, for a period of eight years subsequent to their entrance into the Post Office Department of the Empire.

At the end of the said eight years the distinction shall cease, and any surplus in the Post Office Department shall go, without division, into the Treasury of the Empire, according to the principle enunciated in Article 49.

Of the quota of the Post Office Department surplus resulting during the aforementioned period of eight years in favour of the Hanseatic towns one-half shall every year be placed at the disposal of the Emperor, for the purpose of providing for the establishment of the necessary post offices in the Hanseatic towns.

Article 52. The stipulations of the foregoing Articles 48 to 51 do not apply to Bavaria and Wurtemberg. In their stead the following stipulations shall be valid for these two States of the Empire :

The Empire alone is authorised to legislate upon the privileges of the Post Office and Telegraph Departments, on the legal relations of both institutions toward the public, upon the franking privilege and rates of postage and telegraphic charges, excepting, however, the adoption of administrative regulations and of postal and telegraph tariffs for domestic communication with Bavaria and Wurtemberg respectively.

In the same manner the Empire shall regulate postal and telegraphic communication with foreign countries, excepting the immediate intercourse of Bavaria and Wurtemberg with their adjacent foreign States, the regulation of which is subject to the stipulation in Article 49 of the postal treaty of November 23, 1867.

Bavaria and Wurtemberg shall not share in the postal and telegraphic receipts which belong to the Treasury of the Empire.

IX.—MARINE AND NAVIGATION.

Article 53. The navy of the Empire is a united one, under the supreme command of the Emperor. The Emperor is charged with its constitution and organisation; he shall appoint the officers and officials of the navy, and in his name these and the seamen shall be sworn in.

The harbour of Kiel and the harbour of the Jade are Imperial war harbours.

The expenditure required for the establishment and maintenance of the Navy and the institutions connected therewith shall be defrayed from the Treasury of the Empire.

All seafaring men of the Empire, including machinists and hands employed in ship-building, are exempt from serving in the army, but are obliged to serve in the Imperial navy.

The distribution of requisitions to supply the ranks of the navy shall be made according to the actual seafaring population, and the number furnished in accordance herewith by each State shall be deducted from the number otherwise required for the army.

Article 54. The merchant vessels of all States of the Union shall form the commercial marine of the Empire.

The Empire shall determine the process for ascertaining the tonnage of sea-going vessels, shall regulate the issuing of tonnage-certificates and of ship-certificates in general, and shall fix the conditions on which a permit for commanding a sea-going vessel shall be issued.

The merchant vessels of all the States of the Union shall be admitted on equal footing to the harbours, and to all natural and artificial water-courses of the several States of the Union, and all shall be entitled to similar treatment. The duties which shall be collected in the harbours of sea-going vessels, or levied upon their freights as fees, for the use of marine institutions, shall not exceed the amount required for the ordinary construction and maintenance of these institutions.

On all natural water-courses duties may only be levied for the use of special establishments, which serve for facilitating commercial intercourse. These duties, as well as the duties for navigating such artificial channels as are property of the State, shall not exceed the amount required for the ordinary construction and maintenance of the institutions and establishments. These rules apply to rafting, so far as it is carried on along navigable water-courses.

The levying of other or higher duties upon foreign vessels or their freights than those which are paid by the vessels of the Federal States, or their freights, does not belong to the various States, but to the Empire.

Article 55. The flag of the war and merchant navy shall be black, white and red.

X.—CONSULAR AFFAIRS.

Article 56. The Emperor shall have the supervision of all consular affairs of the German Empire, and he shall appoint con-

suls, after hearing the committee of the Federal Council on Trade and Commerce.

No new State consulates are to be established within the jurisdiction of the German consuls. German consuls shall perform the functions of State consuls for the States of the Union not represented in their district. All the State consulates now existing shall be abolished as soon as the organisation of the German consulates shall be completed in such a manner, that the representation of the separate interests of all the Federal States shall be recognised by the Federal Council as satisfactorily secured by the German consulates.

XI.—MILITARY AFFAIRS OF THE EMPIRE.

Article 57. Every German is subject to military duty, and in the discharge of this duty no substitute can be accepted.

Article 58. The costs and the burden of all the military system of the Empire are to be borne equally by all the Federal States and their subjects, and no special privileges or burdens upon the several States or classes are admissible. Where an equal distribution of the burdens cannot be effected *in natura* without prejudice to the public welfare, the equalisation shall be effected by legislation in accordance with the principles of justice.

Article 59. Every German capable of bearing arms shall belong for seven years to the standing army (ordinarily from the end of his twentieth to the beginning of his twenty-eighth year); the first three years in active service, the last four years in the reserve; and during the next five years he shall belong to the Landwehr (national guard). In those States of the Union in which heretofore a longer term of service than twelve years was required by law, the gradual reduction of the required time of service shall take place only so far as is compatible with a due regard to the war-footing of the army of the Empire.

As regards the emigration of men belonging to the reserve, only those provisions shall be in force which apply to the emigration of members of the Landwehr.

Article 60. The number of the German army in time of peace shall be fixed until the 31st of December, 1871, at 1 per cent. of the population of 1867, and shall be furnished by the several Federal States in proportion to their population. After the above date the strength of the army in time of peace shall be fixed by legislation.

Article 61. After the publication of this Constitution the complete Prussian system of military legislation shall be introduced without delay throughout the Empire, both the statutes themselves and the regulations, instructions, and ordinances issued for their execution, explanation or completion; thus, in particular, the military penal code of April 3, 1845: the military system of penal procedure of April 3, 1845; the ordinance concerning the courts of honour of July 20, 1843; the regulations with respect to recruiting, time of service, matters relating to the care and subsist-

ence, to the quartering of troops, claims for damages, mobilising, etc., in times of peace and war. The military code relating to religious observance is, however, excepted.

When a uniform organisation of the German army for war purposes shall have been established, a comprehensive military code for the Empire shall be submitted to the Diet and the Federal Council for their action, in accordance with the Constitution.

Article 62. For the purpose of defraying the expense of the whole German army, and the institutions connected therewith, the sum of 225 thalers shall be placed yearly at the disposal of the Emperor until the 31st of December, 1871, for each man in the army on the peace-footing, according to Article 60. (See Section 12.)

After the 31st of December, 1871, the payment of these contributions by the several States to the Imperial Treasury must be continued. The strength of the army in time of peace, which has been temporarily fixed in Article 60, shall be taken as a basis for calculating the amounts due until it shall be altered by a law of the Empire.

The expenditure of this sum for the Imperial army and its establishments shall be determined by a budget law.

In determining the budget of military expenditure, the lawfully established organisations of the Imperial army, in accordance with this Constitution, shall be taken as a basis.

Article 63. The total land force of the Empire shall form one army, which in war and in peace, shall be under the command of the Emperor.

The regiments, etc., throughout the whole German army shall bear continuous numbers. In adopting a uniform, the principal colours and cut of the Prussian uniform, shall serve as a pattern for the other contingents of the army. It is left to commanders of contingent forces to choose the external badges, cockades, etc.

It shall be the duty and the right of the Emperor to take care that throughout the German army, all divisions be kept full and ready to take the field, and that uniformity be established and maintained in regard to organisation and formation, equipment and command; in the training of the men, and in the qualifications of the officers. For this purpose the Emperor shall be authorised to satisfy himself at any time, by inspection, of the condition of the several contingents, and to order the correction of existing defects.

The Emperor shall determine the strength, composition, and division of the contingents of the Imperial army, and also the organisation of the Landwehr, and he shall have the right to determine the garrisons within the territory of the Union, as also to mobilise any portion of the army.

In order to maintain the necessary unity in the administration, care, arming and equipment of all divisions of the German army, all orders hereafter issued for the Prussian army shall be communicated in due form for their observance to the commanders of the remaining contingents through the committee on the Army and Fortifications, provided for in Article 8, No. 1.

Article 64. All German troops are bound implicitly to obey the orders of the Emperor. This obligation shall be included in the military oath.

The commander-in-chief of a contingent, as well as all officers commanding troops of more than one contingent, and all commanders of fortresses, shall be appointed by the Emperor. The officers appointed by the Emperor shall take the military oath to him. The appointment of generals, or of officers performing the duties of generals, in a contingent, shall be in each case subject to the approval of the Emperor.

In the transfer of officers, with or without promotion, to positions which are to be filled by him in the service of the Empire, be it in the Prussian army or in other contingents, the Emperor has the right to select from the officers of all the contingents of the army of the Empire.

Article 65. The right to construct fortresses within the territory of the Empire shall belong to the Emperor, who shall ask (according to Section 12) for the appropriation of the means required for that purpose, if not already included in the regular appropriation.

Article 66. In the absence of special agreement, the Princes of the Empire and the Senates shall appoint the officers of their respective contingents, subject to the restriction of Article 64. They are the chiefs of all the troops belonging to their respective territories, and are entitled to the honours connected therewith. They shall have the right to hold inspections at any time, and shall receive, besides the regular reports and announcements of changes, timely information of all promotions and appointments concerning their respective contingents, in order to provide for their publication by State authority as required.

They shall also have the right to employ, for police purposes, not only their own troops, but all other divisions of the army of the Empire which are stationed in their respective territories.

Article 67. The unexpended portion of the military appropriation shall under no circumstances fall to the share of a single government, but at all times to the Treasury of the Empire.

Article 68. The Emperor shall have the power, if public security within the Federal territory demands it, to declare martial law in any part of the Empire; and until the publication of a law regulating the occasions, the form of an announcement, and the effects of such a declaration, the provisions of the Prussian law of June 4, 1851, shall be considered in force.

FINAL PROVISION OF SECTION XI.

The provisions contained in this section are to be applied in Bavaria, according to the provisions of the treaty of November 23, 1870; in Wurtemberg, according to provisions of the military convention of November 21-25, 1870.

XII.—FINANCES OF THE EMPIRE.

Article 69. All receipts and expenditures of the Empire shall be estimated yearly, and included in the budget. The latter shall be

fixed by law before the beginning of the fiscal year, according to the following principles :

Article 70. The surplus of the previous year, the common revenues derived from customs duties, the common excise duties, and from the postal and telegraph service, shall be applied to the defrayal of all general expenditures. In so far as these expenditures are not covered by the receipts, they shall be provided for, as long as no taxes of the Empire shall have been established, by assessing the several States of the Empire according to their population, the amount of the assessment to be fixed by the Chancellor of the Empire in accordance with the budget agreed upon.

Article 71. The general expenditures shall be, as a rule, granted for one year ; they may, however, in special cases, be granted for a longer period. During the period of transition fixed in Article 60, the financial estimate, properly classified, of the expenditures of the army, shall be laid before the Federal Council and the Diet merely for their information.

Article 72. For the purpose of discharge an annual report of the expenditure of all the receipts of the Empire shall be rendered through the Imperial Chancellor, to the Federal Council and the Diet.

Article 73. In cases of extraordinary requirements, a loan may be contracted by Imperial law, or a guarantee assumed in the name of the Empire.

FINAL PROVISION OF SECTION XII.

Articles 69 and 71 apply to expenditures for the Bavarian army, subject to the provisions of the treaty of November 23, 1870 (mentioned in the final provision of Section XI.) and Article 72 only so far as it is required to inform the Federal Council and the Diet that the sum necessary for the Bavarian army has been assigned to Bavaria.

XIII.—SETTLEMENT OF DISPUTES AND PENAL PROVISIONS.

Article 74. Every attempt against the existence, the integrity, the security, or the Constitution of the German Empire ; finally, any offence committed against the Federal Council, the Diet, a member of the Federal Council, or of the Diet, a magistrate or a public official of the Empire, while in the execution of their duty, or with reference to their official position, by word, writing, printing, drawing, pictorial or other representations, shall be judged and punished in the several States of the Empire according to the laws therein existing, or which shall hereafter exist in the same, by which provision is made for the judgment of similar offences against any one of the States of the Empire, its constitution, Legislature, or estates, members of its Legislature or its estates, authorities, or officials.

Article 75. For those offences specified in Article 74 against the German Empire, which, if committed against one of the States of

the Empire, would be deemed high treason, the Superior Court of Appeals of the three free Hanseatic towns at Lübeck shall be the competent deciding tribunal in the first and last resort.

More definite provisions as to the competency and the procedure of the Superior Court of Appeals shall be made by Imperial law. Until the passage of a law of the Empire, the existing competency of the courts in the respective States of the Empire, and the provisions relative to the procedure of those courts shall remain in force.

Article 76. Disputes between the different States of the Union, so far as they are not of a private nature, and therefore to be decided by the competent judicial authorities, shall be settled by the Federal Council, at the request of one of the parties.

In disputes relating to constitutional matters in those States of the Union whose Constitution does not designate an authority for the settlement of such differences, the Federal Council shall, at the request of one of the parties, attempt to bring about an adjustment, and if this cannot be done, the matter shall be settled by Imperial law.

Article 77. If in one of the States of the Union justice shall be denied, and no sufficient relief can be procured by legal measures, it shall be the duty of the Federal Council to receive substantiated complaints concerning denial or restriction of justice, which are to be judged according to the Constitution and the existing laws of the respective States of the Union, and thereupon to obtain judicial relief from the State Government which shall have given occasion to the complaint.

XIV.—AMENDMENTS.

Article 78. Amendments of the Constitution shall be made by legislative enactment. They shall be considered as rejected when fourteen votes are cast against them in the Federal Council.

The provisions of the Constitution of the Empire, by which certain rights are secured to particular States of the Union in their relation to the whole, shall only be modified with the consent of the States affected.

PREAMBLE.

IN THE NAME OF ALMIGHTY GOD !

The Swiss Federation,

For the purpose of strengthening the Union of the Allies and of preserving and promoting the unity, power and honour of the Swiss Nation, has adopted the following Federal Constitution

THE FEDERAL CONSTITUTION OF THE
SWISS CONFEDERATION.*

FIRST DIVISION.

GENERAL PROVISIONS.

ARTICLE 1.

The peoples of the twenty-two sovereign Cantons associated in the present Union, viz. : Zurich, Bern, Luzern, Uri, Schwyz, Unterwalden (Upper and Lower), Glarus, Zug, Freiburg, Solothurn, Basel (City and Country), Schaffhausen, Appenzell (the two Rhodes), St. Gallen, Grisons, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchatel, and Geneva, taken together, form the SWISS CONFEDERATION.

ARTICLE 2

The purpose of the Union is : the maintenance of national independence, establishment of tranquility and order within the country, protection of freedom, and of the rights of the Allies, and the promotion of their common welfare

ARTICLE 3

The Cantons are sovereign, so far as their sovereignty is not restricted by the Federal Constitution, and as such they may exercise all rights which are not delegated to the Federal Power.

* This translation is that prepared for and issued by the University of Pennsylvania.

ARTICLE 4.

All Swiss shall be equal before the law. In Switzerland there shall be no subjects, nor any privileges of place, birth, family or person.

ARTICLE 5.

The Union guarantees to the Cantons their territory, their sovereignty within the limits set by Article 3, their constitutions, liberty, the rights of the people, the constitutional rights of the citizens, and the rights and privileges which the people may have conferred upon their public authorities.

ARTICLE 6.

The Cantons are required to demand of the Union its guaranty for their constitutions.

The Union shall accord this guarantee, provided :

- a. That they contain nothing contrary to the provisions of the Federal Constitution.
- b. That they provide for the exercise of political rights according to Republican (either representative or democratic) forms.
- c. That they have been accepted by the people and can be revised whenever an absolute majority of the citizens demand it.

ARTICLE 7.

All special alliances or treaties of a political character between the various Cantons are forbidden.

The Cantons however, shall have the right to make agreements with one another on subjects pertaining to legislation, justice and administration : such agreements, however, shall be submitted to the Federal authority, which may forbid their execution, if they contain anything contrary to the Union or to the rights of other Cantons. If such agreements are not open to these objections, the respective Cantons may demand the co-operation of the Federal authorities in their execution.

ARTICLE 8.

The Union shall have the sole power to declare war, conclude peace, and enter into alliances or treaties, especially customs and commercial treaties with foreign countries.

ARTICLE 9.

In exceptional cases the Cantons may enter into treaties with foreign countries concerning matters of the public economy, of vicinage, and of police : but such treaties shall not contain anything contrary to the Union or the rights of other Cantons.

ARTICLE 10.

Official intercourse between the Cantons and foreign governments or their representatives shall take place through the Federal Council. But the Cantons may deal directly with the subordinate authorities and officers of a foreign state in regard to matters mentioned in Article 9.

ARTICLE 11.

Military capitulations are absolutely prohibited.*

ARTICLE 12.

Members of the Federal Government, civil and military officials of the Union, and Federal representatives or commissioners, shall not accept from foreign governments any pension, salary, title, present or decoration.

If they are already in possession of pensions, titles or decorations, they shall be required to refuse the pension and refrain from bearing either title or decoration during their term of office.

The Federal Council may, however, permit subordinate officers and appointees to continue to draw their pensions.

Decorations shall not be worn in the Swiss Army, nor shall titles conferred by foreign governments be borne.

Every officer, under-officer and soldier shall be forbidden to accept any such distinction.

ARTICLE 13.

The Union shall not be allowed to maintain a standing army.

Without permission of the Federal Government no Canton, or in the case of Divided Cantons, no Half-Canton, shall be permitted to keep more than 300 permanent troops, exclusive of the gendarmes.

ARTICLE 14.

The Cantons are prohibited, in cases of disputes arising between them, from arming and from all attempts to enforce their own rights, but such dispute shall be submitted to Federal decision.

ARTICLE 15.

If sudden danger threaten any Canton from foreign countries; the government of the endangered Canton shall call upon the other Cantons for help, and notify the Federal Government, at the same time, without prejudice however to the later measures of the same. The Cantons so summoned are bound to come to its aid. The costs shall be borne by the Union.

ARTICLE 16.

When internal order is disturbed or when danger threatens from another Canton, the government of the endangered Canton shall immediately notify the Federal Council, in order that it may take the necessary measures within the limits of its competence (Article 102, Nos. 3, 10 and 11), or may summon the Federal Assembly. In urgent cases the Cantonal government concerned, notifying the Federal Government of its action, may summon other Cantons to its aid, to which the latter are bound to respond.

If the Cantonal Government is unable to call for aid, the competent Federal authority may interfere on its own initiative, and if the safety of Switzerland be endangered, it shall be its duty to do so.

i.e., Agreements to furnish soldiers to foreign countries.

In cases of Federal intervention the Federal authorities shall secure the observance of the provisions of Article 5.

The costs shall be borne by the Canton calling for or compelling intervention, unless the Federal Assembly, on account of peculiar circumstances, shall decide otherwise.

ARTICLE 17.

In the cases mentioned in Articles 15 and 16, every Canton shall permit free passage to the troops through its territory. The troops shall be immediately placed under Federal control.

ARTICLE 18.

Every Swiss is subject to military service. Soldiers who lose their lives or suffer permanent injury to their health in the Federal military service shall be entitled in case of need to Federal support for themselves or families.

Soldiers shall in the first instance be equipped, clothed and armed at public expense. The arms shall remain in possession of the soldier under such conditions as Federal law shall provide.

The Union shall make uniform laws on the subject of fees for exemption from military service.

ARTICLE 19.

The Federal Army shall consist (*a*) of the standing contingents of the Cantons; (*b*) of all Swiss who though not belonging to the standing troops are yet subject to military service.

The control of the Federal Army, together with all the materials for or belonging thereto, shall be an affair of the Union.

In times of danger the Union shall have the exclusive and immediate control over all troops, whether incorporated in the Federal Army or not, and over all other military resources of the Cantons.

The Cantons may exercise control over the military resources of their territory so far as they are not limited by the constitutional or legal regulations of the Union.

ARTICLE 20.

Military legislation is an affair of the Union. The execution of the military laws within the Cantons shall take place by the Cantonal authorities under the supervision of the Union, and according to regulations made by Federal law.

The entire military instruction and the arming of the troops shall be under the control of the Union.

The clothing and equipments and the subsistence of the troops shall be provided by the Cantons; but the costs thereof shall be returned to the Cantons by the Union in a manner to be determined by Federal law.

ARTICLE 21.

So far as military considerations shall not forbid, the various corps shall consist of men from the same Canton.

The composition of such corps, the duty of preserving their

efficiency, and the appointment and promotion of the officers, shall be reserved to the Cantons, subject to general rules to be established by the Union.

ARTICLE 22.

Upon giving fair compensation, the Union shall have the right to take either for use or as property the parade grounds and buildings used for military purposes, together with all their belongings, in the various Cantons.

The system of fixing the compensation shall be determined by Federal law.

ARTICLE 23.

The Union may, in the interest of the Confederation, or of a large part of the same, undertake public works at the expense of the Confederation, or may assist in their construction.

For this purpose it may exercise the right of expropriation upon making full compensation. The special provisions on this subject shall be left to Federal legislation.

The Federal Assembly may forbid the construction of public works whenever they would endanger the military interest of the Confederation.

ARTICLE 24.

To the Union shall belong the general supervision of the water and forest police measures in the mountains.

It shall assist in the correction and control of the mountain streams and in the afforesting of their sources, and shall prescribe the necessary protective regulations for the preservation of such works and of the forest now existing.

ARTICLE 25.

The Union is authorised to adopt regulations as to the exercise of the right of hunting and fishing, especially for the preservation of the nobler sorts of game, and for the protection of birds which are useful to agriculture or forestry.

ARTICLE 26.

Legislation pertaining to the construction and management of railways is an affair of the Union.

ARTICLE 27.

The Union may establish, in addition to the existing Polytechnic School, a University and other higher institutions of learning, or may assist in the support of such institutions.

The Cantons shall provide for satisfactory primary instruction, which shall be solely under public supervision. Such instruction shall be obligatory, and in the public schools free of charge.

The public schools shall be open to the adherents of all faiths, without prejudice to their freedom of belief or of conscience.

The Union shall take such measures as may seem necessary against Cantons which do not conform to these provisions.

ARTICLE 28.

The system of customs duties is a Federal affair. The Union may collect import and export duties.

ARTICLE 29.

In the collection of customs duties the following provisions shall be observed :

1. Import duties.

- a.* The raw material necessary for domestic industry or agriculture shall be taxed at as low a rate as possible.
- b.* Likewise all articles which may be classed as necessities of life.
- c.* Articles of luxury shall pay the highest rates.

The foregoing principles are to be observed in the conclusion of commercial treaties with foreign countries so far as possible.

2. Export duties are to be fixed at as low a rate as possible.

3. The necessary regulations as to intercourse along the frontier and at the markets shall be incorporated in the customs tariff legislation. The Union may at any time under extraordinary circumstances adopt temporary measures in conflict with the foregoing principles.

ARTICLE 30.

The income from customs shall flow into the Federal Treasury

The compensations which have hitherto been paid to the Cantons in lieu of the customs, road and bridge tolls, market fees, and similar items, are hereby abolished.

As an exceptional indemnity the Cantons Uri, Grisons, Ticino and Valais, in consideration of their international Alpine highways, shall receive a yearly compensation which in view of all circumstances is fixed as follows :

					Francs.
For Uri	..	..	..	..	80,000.
„ Grisons	..	..	..	..	200,000.
„ Ticino	..	..	..	..	200,000.
„ Valais	..	..	..	..	50,000.

For breaking roads through the snow on the St. Gothard, the Cantons Uri and Ticino shall receive a yearly compensation of 40,000 francs, all told, until the road over the pass is replaced by a railway.

ARTICLE 31.

The freedom of trade and of industry throughout the whole extent of the Confederation is hereby guaranteed. Excepted from this rule are :

- a.* The salt and tobacco monopoly, the Federal customs, the import duties on wine and spirituous liquors, as well as the other taxes on consumable commodities expressly recognised by the Union according to the provisions of Article 32.

- b.* Sanitary police regulations against epidemics and veterinary diseases.
- c.* Regulations as to exercise of trade and industry, as to taxation of business and the use of streets.

But such Regulations must not interfere with the principle of freedom of trade and commerce.

ARTICLE 32.

The Cantons may collect import duties on wine and other spirituous liquors mentioned in Article 31, *a*, *b* and *c*, under the following conditions. :

- a.* In the collection of such duties, free transit of goods shall be interfered with in no way ; and, in general, trade shall be hindered as little as possible, and burdened with no other duties.
- b.* If the articles imported for use are again exported, the duties so paid shall be refunded without further charges.
- c.* The products of Swiss industry shall be taxed at a lower rate than those of foreign origin.
- d.* Import duties on wine and other spirituous liquors of Swiss origin shall not be increased where they now exist, nor be introduced into Cantons which do not levy such dues.*
- e.* The laws and ordinances of the Cantons in reference to such import duties shall be submitted for approval to the Federal authorities before going into effect, so that neglect of the foregoing provisions may be prevented.

With the close of the year 1890 all import duties which may be levied at that time by the Cantons, as well as all similar duties raised by individual communities, shall be abolished without compensation.

ARTICLE 33.

The Cantons may make the practice of the liberal professions dependent upon giving evidence of fitness.

Federal legislation shall provide a means of obtaining certificates of such fitness, which shall be valid throughout the whole Confederation.

ARTICLE 34.

The Union may pass uniform laws as to the employment of children in factories and the length of the working day for adults in the same. It is also authorised to issue regulations for the protection of labourers in dangerous or unhealthful employments.

The business of emigration agents and of private insurance companies shall be subject to the supervision and legislation of the Union.

ARTICLE 35.

The establishment of gambling houses is prohibited. Those now in existence shall be closed by the 31st December, 1877.

All concessions granted or renewed since the beginning of the year 1871 are hereby declared null and void.

The Union may also take proper measures in regard to lotteries.

* The manufacture and sale of spirituous liquors was made a federal monopoly, October 25, 1885.

ARTICLE 36.

The post and telegraph throughout the whole extent of the Confederation belong to the Union.

The income from the administration of post and telegraph shall belong to the Federal Treasury.

The tariff of charges shall be regulated throughout the territory of the Confederation according to uniform principles in as equitable a manner as possible.

The inviolability of postal and telegraph secrecy is guaranteed.

ARTICLE 37.

The Union shall exercise general supervision over the roads and bridges in whose maintenance the Union may have an interest.

The moneys which according to Article 30 belong to certain Cantons in view of their international Alpine highways shall be retained by the Federal authorities in case these roads are not kept in good condition by the respective Cantons.

ARTICLE 38.

To the Union shall belong the exercise of all rights included in the coinage monopoly.

The Union alone shall coin money.

It shall determine the monetary system and prescribe regulations for the valuation of foreign coin.

ARTICLE 39.

The Union is authorised to make general regulations by Federal law as to the issue and redemption of bank notes.

It shall not, however, establish any monopoly for the issue of bank notes, nor make them a legal tender.

ARTICLE 40.

The establishment of weights and measures is an affair of the Union.

The execution of laws relating to this subject shall be undertaken by the Cantons under the supervision of the Union.

ARTICLE 41.

The manufacture and sale of gunpowder throughout the whole territory of the Confederation belongs solely to the Union.

Blasting materials not usable as gunpowder are not included in this monopoly.

ARTICLE 42.

The expenditures of the Union shall be defrayed :

- a.* From the proceeds of Federal property.
- b.* From the proceeds of Federal frontier duties.
- c.* From the proceeds of the post and telegraph.
- d.* From the proceeds of the powder monopoly.
- e.* From the proceeds of half the gross income from the fees for exemption from military service received by the Cantons.
- f.* From the contributions of the Cantons, to be determined by Federal legislation according to the taxable resources of the Cantons, upon as equitable a basis as possible.

ARTICLE 43.

Every citizen of a Canton is also a Swiss citizen.

As such (after furnishing evidence of his right to vote) he can take part at his place of residence in all Federal elections and votes.

No one shall exercise political rights in more than one Canton.

Every Swiss citizen shall enjoy at his place of residence all rights of the citizens of the Canton, as also all rights of the citizens of the commune.

He shall, however, have no share in the common property of citizens or of the corporation, nor shall he exercise the right to vote in matters pertaining purely to such affairs, unless the Cantonal laws determine otherwise.

In Cantonal and commercial matters he shall acquire the right to vote by a residence of three months.

The Cantonal laws in relation to settlement and the right to vote of those who settle in the communes are subject to the approval of the Federal Council.

ARTICLE 44.

No Canton shall expel a Cantonal citizen from its territory or deprive him of the right of citizenship.

The conditions on which foreigners may be admitted to Swiss citizenship, as well as those under which a Swiss may renounce his citizenship, for the sake of acquiring a foreign citizenship, shall be determined by Federal legislation.

ARTICLE 45.

Every Swiss shall have the right to settle at any place within Swiss territory if he possesses a certificate of origin or some similar paper.

In exceptional cases, the right of settlement may be refused to those who in consequence of criminal sentence are not in possession of the rights and dignity of citizenship, or it may be withdrawn from such.

The right of settlement may, moreover, be withdrawn from those who in consequence of serious misdemeanours have been repeatedly punished, as also from those who become a permanent burden upon public charity, and whose native commune or Canton refuses to give adequate assistance, in spite of official notification to do so.

In Cantons where the system of local relief obtains, the permission of settlement for natives of the Canton may be made dependent on the condition that the parties are able to work and have not hitherto been a permanent burden upon public charity in their previous place of residence.

Every expulsion on account of poverty must be approved by the Cantonal government, and notice must first be sent to the government of the Canton of which the person expelled is a native.

No Swiss citizen may be burdened by the Canton which may permit him to settle within its bounds by the requirement of security or any other special burdens connected with settlement.

Nor shall the commune in which he settles tax him in any different way from its own native citizens.

A Federal law shall fix the maximum sum which may be taken as registration fee for the privilege of settling.

ARTICLE 46.

With regard to the civil relations, those who have settled in a place shall be subject as a rule to the rights and legislation of the place of residence.

Federal law shall determine the application of this principle, and shall also make the necessary regulations to prevent double taxation.

ARTICLE 47.

A Federal law shall define the difference between settlement and sojourn, and also prescribe the regulations as to the political and civil rights of sojourners.

ARTICLE 48.

A Federal law shall make provision as to the cost of the care and burial of poor citizens of one Canton who may become sick or die in another Canton.

ARTICLE 49.

The freedom of faith and conscience shall be inviolable.

No one shall be compelled to take part in any religious society or in any religious instruction, or to undertake any religious act, nor shall he be punished in any way whatever for his religious views.

The religious education of children to the close of their 16th year shall be under the control of father or guardian, subject to the principles enumerated above.

The exercise of civil or political rights shall not be abridged by any conditions or provisions of a confessional or religious nature.

Religious views shall not absolve from the performance of civil duties.

No one shall be required to pay taxes which are levied specially for the purely religious purposes of any religious society to which he does not belong. The exact application of this principle shall be determined by Federal legislation.

ARTICLE 50.

The free exercise of religion is guaranteed, within the limits of morality and public order.

The Cantons and the Union shall have the right to take necessary measures for the establishment of order and public peace among the adherents of the various religious societies, as well as against any interference in the rights of citizens or of the State by church authorities.

Disputes within either the field of public or private law arising from the formation or division of religious societies may be brought before the proper Federal authorities for decision by means of formal complaint.

The establishment of bishoprics on Swiss soil is subject to Federal approval.

ARTICLE 51.

Neither the Society of Jesus nor any allied Society shall be suffered in any part of Switzerland, and all participation of their members either in church or school is prohibited.

This prohibition may also be extended by Federal law to other religious orders whose action is dangerous to the state or tends to destroy the peace between the various confessions.

ARTICLE 52.

The establishment of new, or the restoration of disestablished, monasteries or orders is forbidden.

ARTICLE 53.

The determination and certification of facts of the civil state belongs to the civil authorities. More exact regulations shall be made by Federal law.

The disposition of burial places shall belong to the civil authorities. It is their duty to see that every one can be decently buried.

ARTICLE 54.

The right of marriage shall be under the protection of the Union.

This right shall not be limited for confessional or economic considerations, nor on account of previous conduct or other police reasons.

All marriages contracted in a Canton or in a foreign country according to the laws there prevailing shall be recognised as marriage within the territory of the Confederation.

By marriage the wife acquires the right of domicile and settlement belonging to the man.

By subsequent marriage of the parents, children are rendered legitimate who were born before marriage.

All collection of bridal settlement fees and similar taxes is prohibited.

ARTICLE 55.

Freedom of the press is guaranteed.

Cantonal legislation shall provide for all abuse of the same, but such legislation shall be subject to the approval of the Federal Council.

The Union may issue regulations against the abuse of the freedom of the press when it is directed against the Union or its officers.

ARTICLE 56.

The citizens shall have the right to form associations, so far as they are not either in their purpose or methods illegal or dangerous to the State. The abuse of this right may be prevented by Cantonal legislation.

ARTICLE 57.

The right of petition is guaranteed.

ARTICLE 58.

No one shall be deprived of his constitutional judge, and there shall consequently be no exceptional courts.

Ecclesiastical jurisdiction is hereby abolished.

ARTICLE 59.

A solvent debtor with a permanent residence in Switzerland must be summoned in personal suits before a judge of his own place of residence, and the property of such a person (outside of the Canton in which he lives) cannot be seized or sequestered for claims against him.

Provided that with reference to foreigners the provisions of the respective international treaties shall apply.

Imprisonment for debt is hereby abolished.

ARTICLE 60.

All Cantons are required to treat all Swiss citizens like their own citizens, both in their legislation and in judicial procedure.

ARTICLE 61.

Valid judgments in civil cases which have been given in one Canton may be enforced anywhere in Switzerland.

ARTICLE 62.

All internal taxes on property leaving one Canton for another (*abzugsrechte*, *la traite foraine*) are hereby abolished as likewise all rights of first purchase (*zugrechte*, *droit de retrait*), of citizens of one Canton against those of another Canton.*

ARTICLE 63.

The right of free emigration to foreign states shall be recognised so far as this is reciprocal.

ARTICLE 64.

The Union shall have power to legislate :

1. Upon civil capacity.
2. Upon all legal relations referring to trade and mobiliary transactions (law of obligations, including commercial law and law of promissory notes).
3. Upon authors' property in works of literature and art, upon executionary procedure for debts, and upon the law of bankruptcy.†

The administration of the laws shall belong to the Cantons, except so much as may be assigned to the Federal Tribunal..

ARTICLE 65.

No sentence of death shall be pronounced for political offences. Corporal punishments are hereby forbidden.

ARTICLE 66.

Federal law shall determine the conditions in which a Swiss citizen may be declared to have forfeited his political rights.

* It was customary formerly to deduct from 5 to 10 % from all property going out of the Canton by inheritance or marriage (*abzugsrecht*). It was also usual when a person wished to sell land, to recognize a right in his relatives or even neighbours or fellow citizens of the Canton to take the property at an arbitrated value (*zugrecht*).

† July 10, 1887, this clause was practically amended by the acceptance of a patent law.

ARTICLE 67.

† Federal law shall prescribe the necessary regulations as to the extradition by one Canton to another of accused persons, but such extradition shall not be made compulsory for political offences or offences against the press laws.

ARTICLE 68.

Federal legislation shall determine the civil rights of people without a domicile, and shall take measures to prevent the rise of such classes.

ARTICLE 69.

The Union shall have power to legislate upon the sanitary regulations to be adopted against dangerous epidemics and veterinary diseases.

ARTICLE 70.

The Union may expel from Swiss territory all foreigners who endanger the internal or external safety of the Confederation.

SECOND DIVISION.

FEDERAL AUTHORITIES.

I. FEDERAL ASSEMBLY.

ARTICLE 71.

Excepting the rights of the people and the Cantons (Articles 89 and 121), the supreme authority of the Union shall be exercised by the Federal Assembly, which shall consist of two divisions :

A. The National Council.

B. The Council of States.

A.—The National Council.

ARTICLE 72.

The National Council shall consist of representatives of the Swiss people. One member shall be chosen for every 20,000 of the whole population.

A fraction of more than 10,000 souls shall be counted as 20,000.

Every Canton, and in the Divided Cantons each division thereof, shall choose at least one member.

ARTICLE 73.

The elections for the National Council shall be direct. They shall take place within Federal districts, but no district shall include portions of two different Cantons.

ARTICLE 74.

Every male Swiss who has completed his 20th year, and who is not excluded from the active right of citizenship according to the laws of the Canton where he resides, shall be entitled to take part in elections and votes.

The Union may, however, pass uniform laws as to the right to vote.

ARTICLE 75.

Every male Swiss citizen being a layman and a voter is eligible as member of the National Council.

ARTICLE 76.

The National Council shall be elected for three years, the term of all members expiring at the same time.

ARTICLE 77.

Members of the Council of States or of the Federal Council, or officers appointed by the latter, shall not be at the same time members of the National Council.

ARTICLE 78.

The National Council shall choose from among its members a President and a Vice-President for each ordinary and extraordinary session.

The member who has filled the office of President for one ordinary session is not eligible either for President or Vice-President of the ordinary session immediately following. Nor can the same person be Vice-President for two consecutive ordinary sessions.

The President shall have the casting vote in case of a tie: in elections he votes as any other member.

ARTICLE 79.

The members of the National Council shall receive a compensation from the Federal Treasury.

B.—The Council of States.

ARTICLE 80.

The Council of States shall consist of forty-four representatives of the Cantons. Each Canton shall elect two representatives, and in the divided Cantons each division shall elect one.

ARTICLE 81.

No member of the National Council or of the Federal Council shall be at the same time a member of the Council of States.

ARTICLE 82.

The Council of States shall elect from among its members a President and a Vice-President for each ordinary and extraordinary session.

From among the representatives of that Canton from which a President has been chosen for an ordinary session, neither the President or Vice-President can be taken for the next following ordinary session.

Representatives of the same Canton shall not fill the office of Vice-President during two consecutive ordinary sessions.

The President may give the casting vote in case of a tie : in elections he votes as any other member.

ARTICLE 83.

Members of the Council of States shall be compensated by their respective Cantons.

C.—Powers of the Federal Assembly.

ARTICLE 84.

The National Council and the Council of States shall have jurisdiction over all subjects which, according to this Constitution, fall within the competence of the Union and which are not assigned to other Federal authorities.

ARTICLE 85.

The subjects which fall within the sphere of the two Councils are especially the following :

1. Laws pertaining to the organisation and mode of selection of the Federal authorities.

2. Laws and decisions upon those subjects whose regulation is entrusted to the Union by the Federal Constitution.

3. Remuneration and compensation of the members of the Federal Official Boards and of the Federal Secretariat : establishment of permanent offices and determination of their salaries.

4. Choice of the Federal Council, of the Federal Tribunal, of the Federal Secretary and of the General of the Federal Army.

The choice or approval of other appointees may by Federal law be entrusted to the Federal Assembly.

5. Alliances and treaties with foreign countries and approval of Cantonal treaties with other Cantons or with foreign countries. Such Cantonal treaties shall, however, not be submitted to the Federal Assembly unless objection be raised to them by the Federal Council or by another Canton.

6. Measures for external safety, for maintenance of the independence and neutrality of Switzerland, declarations of war and conclusions of peace.

7. Guarantees of the constitutions and territory of the Cantons ; intervention in consequence of the guarantee ; measures for internal safety, for the establishment of tranquility and order ; amnesty and pardon.

8. Measures for securing observance of the Federal Constitution ; the guarantee of the Cantonal constitutions, the fulfilment of Federal obligations.

9. Regulations concerning the Federal Army.

10. Establishment of the yearly budget, approval of public accounts, and decrees as to contracting loans.
11. General supervision of the Federal administration and justice.
12. Appeals from the decisions of the Federal Council in administrative disputes.
13. Disputes as to competence among the Federal authorities.
14. Revision of the Federal Constitution.

ARTICLE 86.

Both Councils shall convene once each year in ordinary session on a day to be fixed by regulation.

They may also be summoned in extraordinary session by vote of the Federal Council or on demand of one-fifth of the members of the National Council, or of five Cantons.

ARTICLE 87.

No valid action can be taken in either Council, unless a majority of the members be present.

ARTICLE 88.

In the National Council, and in the Council of States, the majority of those voting shall decide the question.

ARTICLE 89.

For Federal laws and Federal decrees, the consent of both Councils is necessary.

Federal laws, as also general Federal decrees—if not of an urgent nature—must also be submitted to popular vote upon demand of 30,000 qualified voters or of 8 Cantons.

ARTICLE 90.

Necessary details as to forms and times of popular voting shall be fixed by Federal law.

ARTICLE 91.

The members of both Councils vote without instructions.

ARTICLE 92.

The Councils deliberate separately. In case of elections, of granting pardons, and of deciding disputes as to competence (Article 85, 13) the two Councils shall, however, meet in joint session under the chairmanship of the President of the National Council. Votes shall be decided by simple majority of all members of both Councils voting.

ARTICLE 93.

Each Council and every member of each Council shall have the right to make propositions (*i.e.*, have the right of initiative).

The same right belongs to the Cantons by correspondence.

ARTICLE 94.

The sessions of both Councils shall, as a rule, be public.

II.—FEDERAL COUNCIL.

ARTICLE 95.

The supreme executive and directive body of the Confederation shall be a Federal Council consisting of seven members.

ARTICLE 96.

The members of the Federal Council shall be chosen by the Federal Assembly for the term of three years, from among all Swiss citizens who are eligible to the National Council. Not more than one member shall be chosen from the same Canton.

After every general election for the National Council, the Federal Council shall also be integrally renewed.

In cases of vacancy in the meantime in the Federal Council, the vacancies shall be filled for the rest of the term at the next meeting of the Federal Assembly.

ARTICLE 97.

The members of the Federal Council shall not hold any office either in the service of the Union or of a Canton, nor engage in any other calling or business.

ARTICLE 98.

The Federal President who shall preside over the Federal Council shall be chosen, together with the Vice-President, for the term of one year, by the Councils in joint session from among their members.

The retiring President is not eligible either as President or Vice-President for the next following year. The same member may not hold the office of Vice-President for two consecutive years.

ARTICLE 99.

The Federal President and the other members of the Federal Council shall receive a compensation from the Federal Treasury.

ARTICLE 100.

In order to make action valid, four members of the Federal Council must be present.

ARTICLE 101.

The members of the Federal Council shall have the right to take part in the discussions of both branches of the Federal Assembly, and also the right to make motions on any matter under consideration.

ARTICLE 102.

The Federal Council shall have especially the following rights and duties, subject to the provisions of the present Constitution :

1. It shall direct Federal affairs according to Federal laws and decrees.

2. It shall care for the due observance of the Constitution, laws, and decrees of the Union, as well as the provisions of Federal concordats. It shall take the necessary measures for their execution either on its own initiative or upon complaint, so far as the decision of such affairs has not been vested in the Federal Tribunal by Article 113.

3. It shall enforce the guarantee of the Cantonal Constitutions.
 4. It shall propose to the Federal Assembly laws and decrees, and shall report upon the propositions sent to it by the Councils of the Union or by the Cantons.
 5. It shall execute the Federal laws and decrees, the judgments of the Federal Tribunal, as well as the compromises and arbitrators' decisions on questions of dispute among the Cantons.
 6. It shall make such appointments as are not entrusted to the Federal Assembly, Federal Tribunal, or to some other body.
 7. It shall examine the treaties of the Cantons with one another or with foreign countries, and shall approve them so far as they are permissible. (Article 85, No. 5.)
 8. It shall protect the external interests of the Union especially in all international relations and shall in general have charge of foreign affairs.
 9. It shall protect the internal safety, and the independence and neutrality of Switzerland.
 10. It shall care for the external security of the Union, and for the establishment of quiet and order.
 11. In urgent cases the Federal Council shall have authority, if the Councils are not in session, to call out the necessary number of troops and employ them as it shall see fit: provided that it shall call the Councils together immediately, and provided further that the number of men called out shall not exceed two thousand, nor the term of service exceed three weeks.
 12. It shall have charge of Federal army affairs, and all branches of administration which belong to the Union.
 13. It shall examine those laws and ordinances of the Cantons which require its approval; and shall watch over those branches of Cantonal administration which are subject to its supervision.
 14. It shall manage the finances of the Union, and provide for the preparation of estimates and for a statement of the accounts of Federal income and expenditure.
 15. It shall exercise the supervision over the conduct of business by all officers and employees of the Federal administration.
 16. It shall report to the Federal Assembly at each ordinary session upon its conduct of business, upon the internal condition and foreign relations of the Union, and shall recommend to its attention such measures as in its judgment are desirable for the promotion of the common welfare.
- It shall also make special reports upon the demand of the Federal Assembly or either branch thereof.

ARTICLE 103.

The business of the Federal Council shall be divided according to departments among its various members. The sole purpose of this division is to facilitate the examination and despatch of business. Every decision must emanate from the Federal Council as a body.

ARTICLE 104.

The Federal Council and its departments are authorised to call in the aid of experts for special matters.

III.—FEDERAL SECRETARIAT.

ARTICLE 105.

The duties of Secretary to the Federal Assembly and Federal Council shall be performed by a Federal Secretariat under the direction of a Federal Secretary.

The Secretary shall be chosen for the term of three years by the Federal Assembly, at the same time as the Federal Council.

The Federal Secretariat shall be under the special supervision of the Federal Council.

The details of the organisation of the Federal Secretariat shall be determined by Federal law.

IV.—ORGANISATION AND POWERS OF THE FEDERAL TRIBUNAL.

ARTICLE 106.

For the administration of justice, so far as it belongs to the Union, a Federal Tribunal shall be organised.

In criminal cases (Article 112) all trials shall be by jury.

ARTICLE 107.

The members of the Federal Tribunal and their substitutes shall be chosen by the Federal Assembly. In this choice care shall be taken that the three national languages shall be represented.

The organisation of the Federal Tribunal and of its divisions, the number of its members and substitutes, and their term of office and compensation, shall be determined by law.

ARTICLE 108.

Any Swiss citizen who is eligible to the National Council may be chosen a member of the Federal Tribunal.

The members of the Federal Assembly, or Federal Council, or officers appointed by either of these bodies, shall not at the same time be members of the Federal Tribunal.

The members of the Federal Tribunal shall not hold any other office in the service, either of the Union or of any Canton, nor pursue any other calling or business during their term of office.

ARTICLE 109.

The Federal Tribunal shall organise its own Secretariat.

ARTICLE 110.

The judicial authority of the Federal Tribunal shall extend to civil cases :

1. Between the Union and any Canton.
2. Between the Union and corporations or private persons, when such corporations or private persons are the plaintiffs, and the subject of dispute exceeds a certain value to be fixed by Federal legislation.
3. Between Cantons.

4. Between Cantons and corporations or private persons upon the demand of either party, where the subject of dispute exceeds a certain value to be fixed by Federal legislation.

The Federal Tribunal shall, moreover, pass upon appeals in regard to loss of domicile (*Heimathlosigkeit*) and upon civil disputes between communes of different Cantons.

ARTICLE 111.

The Federal Tribunal shall, moreover, decide other cases upon the demand of both parties to the suit, when the litigation concerns matters exceeding a certain value to be fixed by Federal legislation.

ARTICLE 112.

With the aid of juries which shall pass upon the facts, the Federal Tribunal shall also decide in criminal cases :

1. Involving high treason against the Union, or revolt or violence against the Federal authorities.
2. Involving crimes and misdemeanours against international law.
3. Involving political crimes or misdemeanours which are the cause or consequence of such disturbances as call for armed intervention on the part of the Union.
4. Involving charges against officials appointed by a Federal authority, upon the application of the latter.

ARTICLE 113.

The Federal Tribunal shall decide further :

1. Disputes as to competence between Federal and Cantonal authorities.
 2. Disputes on points of public law between Cantons.
 3. Complaints concerning violation of the Constitutional rights of citizens, and appeals of private citizens on account of violation of concordats between Cantons or violation of international treaties.
- Administrative disputes, however (to be more exactly defined by Federal legislation), shall be excluded from the jurisdiction of the Federal Tribunal.

In all these cases, however, the laws and general decrees of the Federal Assembly, and the treaties approved by them, shall be the supreme law for the Federal Tribunal.

ARTICLE 114.

Besides the subjects mentioned in Articles 110, 112 and 113, other cases may be placed by Federal law within the competence of the Federal Tribunal. Federal law shall determine, moreover, what powers shall be entrusted to the Federal Tribunal for securing uniformity in the application of such Federal laws as may be passed in accordance with Article 64.

V.—VARIOUS PROVISIONS.

ARTICLE 115.

Federal law shall determine the seat of the Federal authorities.

ARTICLE 116.

The three leading languages of Switzerland, German, French, and Italian, shall be considered national languages of the Union.

ARTICLE 117.

The officials of the Union shall be responsible for their conduct of business. Federal law shall define this responsibility and the means of enforcing it.

THIRD DIVISION.

REVISION OF THE CONSTITUTION.

ARTICLE 118.

The Federal Constitution may be revised at any time.

ARTICLE 119.

Each revision shall take place by the ordinary method of Federal legislation.

ARTICLE 120.

If one branch of the Federal Assembly vote for revision and the other does not approve, or upon the demand of fifty thousand qualified voters—in either case—the question of revision must be submitted to the Swiss people for their decision.

Whenever the majority of citizens voting shall favour revision, both Councils shall be elected anew in order to undertake the revision.

ARTICLE 121.

The revised Constitution shall go into effect whenever it shall receive a majority of all the votes cast and the approval of a majority of the Cantons.

In determining the majority of the Cantons, the vote of each part of a divided Canton shall be counted as half a vote.

The result of the popular vote in each Canton shall be taken as determining the vote of the Canton.

TRANSITION PROVISIONS.

ARTICLE I.

With respect to the disposition of the revenue from customs and the post, existing provisions shall remain in force until the transfer to the Union of the military burdens now borne by the Cantons shall be completed.

A Federal law shall, moreover, provide that those Cantons which shall suffer financial loss on account of the new arrangements introduced by Articles 20, 30, 36, second clause, and 42 *e*, shall not be subjected to the entire loss at once, but the loss shall be distributed in a series of years.

Those Cantons which up to the time when Article 20 shall go into effect shall still be in arrears for the military services due under the existing Constitution and laws, shall be required to make good these services at their own cost.

ARTICLE 2.

All provisions of existing Federal laws, of the Concordats or the Cantonal Constitutions and laws, which are in conflict with the new Constitution, become null and void when it shall be accepted, or when the Federal laws passed in pursuance thereof shall be published.

ARTICLE 3.

The new provisions in regard to the powers of the Federal Tribunal shall not take effect until the passage of the Federal laws relating to it.

ARTICLE 4.

The Cantons shall be allowed a period of five years within which to introduce the system of gratuitous public primary schools.

ARTICLE 5.

Persons following one of the learned professions who may have obtained a certificate of fitness from any Canton, or from any official body representing several Cantons, prior to the passage of the laws indicated in Article 33, shall be entitled to practice their profession throughout the whole Union.

Voted to submit to the people and Cantons by the National Council.

Bern, January 31, 1874.

ZIEGLER, President.

SCHIESS, Keeper of the Minutes.

Voted to submit to the people and Cantons by the Council of States.

Bern, January 31, 1874.

A. KOPP, President.

J. L. LUTSCHER, Keeper of the Minutes.

FEDERAL DECREE.

Concerning the result of the vote upon the revised Federal Constitution, submitted January 31, 1874 (of the 29th of May, 1874).

THE FEDERAL ASSEMBLY OF THE SWISS CONFEDERATION.

After examination of the reports of the vote of the Swiss people upon the revised Federal Constitution, submitted January 31, 1874, which vote was taken on April 19, 1874 :

After receiving the declarations of the proper Cantonal authorities in regard to the vote of the Cantons on the same subject :

After examination of a message of the Federal Council, dated May 20, 1874,

From which document it appears :

- a. That in regard to the popular vote * * * * *
340,199 declared in favour of acceptance, and 198,013 declared against acceptance, leaving a majority of 142,186 in favour of acceptance.
- b. That in regard to the vote of the Cantons, 14½ Cantons voted in favour of acceptance, and 7½ voted against acceptance, leaving a majority of 7 Cantons in favour of acceptance.

Hereby declares :

1. That the revised Federal Constitution, submitted by the Federal law of January 31, 1874, has received both the majority of all votes cast, and the approval of a majority of all the Cantons, and that it is, therefore, hereby solemnly declared in effect, bearing date of May 29, 1874.
2. The Federal Council is hereby entrusted with the publication of the present resolution, and with the further measures which may be necessary for its execution.

Voted by the National Council.

Bern, May 28, 1874.

ZIEGLER, President.

SCHIESS, Keeper of the Minutes.

Voted by the Council of States.

Bern, May 29, 1874.

A. KOPP, President.

J. L. LUTSCHER, Keeper of the Minutes.

The Swiss Federal Council enacts :

The foregoing Federal Decree, together with the Swiss Federal Constitution, shall be enrolled in the official collection of Statutes of the Union, and the Decree shall be transmitted to the Governments of the Cantons to be published by them through posting up in public places.

Bern, May 30, 1874.

SHENK, Federal President.

SCHEISS, Federal Secretary.

63 & 64 VICT. C. 12—COMMONWEALTH OF AUSTRALIA
CONSTITUTION ACT.

CAP. XII.

An Act to constitute the Commonwealth of Australia.

[9th July, 1900.]

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established :

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. This Act may be cited as the Commonwealth of Australia *Short title.*
Constitution Act.

2. The provisions of this Act referring to the Queen shall extend *Act to extend to*
to Her Majesty's heirs and successors in the sovereignty of the *the Queen's*
United Kingdom. *successors.*

3. It shall be lawful for the Queen, with the advice of the Privy *Proclamation of*
Council, to declare by proclamation that, on and after a day therein *Commonwealth.*
appointed, not being later than one year after the passing of this
Act, the people of New South Wales, Victoria, South Australia,
Queensland, and Tasmania, and also, if Her Majesty is satisfied
that the people of Western Australia have agreed thereto, of
Western Australia, shall be united in a Federal Commonwealth
under the name of the Commonwealth of Australia. But the
Queen may, at any time after the proclamation, appoint a Governor-
General for the Commonwealth.

4. The Commonwealth shall be established, and the Constitu- *Commonwealth*
tion of the Commonwealth shall take effect, on and after the day *of Act*
so appointed. But the Parliaments of the several colonies may at
any time after the passing of this Act make any such laws, to come
into operation on the day so appointed, as they might have made
if the Constitution had taken effect at the passing of this Act.

5. This Act, and all laws made by the Parliament of the Com- *Operation of the*
monwealth under the Constitution, shall be binding on the courts, *constitution and*
judges, and people of every State and of every part of the Com- *laws.*
monwealth, notwithstanding anything in the laws of any State;
and the laws of the Commonwealth shall be in force on all British
ships, the Queen's ships of war excepted, whose first port of clear-
ance and whose port of destination are in the Commonwealth.

Definitions.

6. "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

"The States" shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called "a State."

"Original States" shall mean such States as are parts of the Commonwealth at its establishment.

Repeal of
Federal Council
Act. 48 & 49 Vict
c. 60.

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

Application of
Colonial
Boundaries Act.
58 & 59 Vict. c.
24.

8. After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

9. The Constitution of the Commonwealth shall be as follows:—

This Constitution is divided as follows:—

Chapter I. The Parliament:

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CHAPTER I.

THE PARLIAMENT.

Part I.—General.

Legislative
power.

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth."

Governor-
General.

2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have

and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

3. There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds. Salary of Governor-General

The salary of a Governor-General shall not be altered during his continuance in office.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth. Provision relating to Governor-General

5. The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives. Sessions of Parliament, Prorogation and Dissolution

After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs. Summoning of Parliament

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth. First Session

6. There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session. Yearly Session of Parliament

Part II.—The Senate.

7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate. The Senate

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

8. The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, Qualification of Electors

as the qualification for electors of members of the House of Representatives ; but in the choosing of senators each elector shall vote only once.

Method of election of senators.

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

Times and places.

The Parliament of a State may make laws for determining the times and places of election of senators for the State.

Application of State laws.

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

Failure to choose senators.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

Issue of writs.

12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

Rotation of senators.

13. As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable ; and the places of the senators of the first class shall become vacant at the expiration of the third year, and the places of those of the second class at the expiration of the sixth year, from the beginning of their term of service ; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made in the year at the expiration of which the places are to become vacant.

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of January following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of January preceding the day of his election.

Further provision for rotation.

14. Whenever the number of senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

Casual vacancies.

15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor

of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens.

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General.

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives. Qualification of senators.

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President. Election of President.

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence. Absence of President.

19. A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant. Resignation of senator.

20. The place of a senator shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the Senate, fails to attend the Senate. Vacancy by absence.

21. Whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth the Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened. Vacancy to be notified.

22. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers. Quorum.

23. Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative. Voting in Senate.

Part III.—The House of Representatives.

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators. Constitution of House of Representatives.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner :—

- (i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators :
- (ii.) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota ; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

Provision as to
races disqualified
from voting.

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Representatives
in first
Parliament.

26. Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows :—

New South Wales	..	..	..	..	twenty-three ;
Victoria	..	..	..	..	twenty ;
Queensland	..	..	..	..	eight ;
South Australia	..	..	..	..	six ;
Tasmania	..	..	..	..	five ;

Provided that if Western Australia is an Original State, the numbers shall be as follows :—

New South Wales	..	..	..	..	twenty-six ;
Victoria	..	..	..	..	twenty-three ;
Queensland	..	..	..	..	nine ;
South Australia	..	..	..	..	seven ;
Western Australia	..	..	..	..	five ;
Tasmania	..	..	..	..	five.

Alteration of
number of
members.

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

Duration of
House of
Representatives.

28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

Electoral
divisions.

29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.

In the absence of other provision, each State shall be one electorate.

30. Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once. Qualification of electors

31. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives. Application of State laws

32. The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives. Writs for general election

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof.

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ. Writs for vacancies

34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:— Qualifications of members

(i.) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:

(ii.) He must be a subject of the Queen, either natural-born or for at least five years naturalised under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker. Election of Speaker

The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General.

36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence. Absence of Speaker

37. A member may by writing addressed to the Speaker, or to the Governor-General if there is no Speaker or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant. Resignation of member

Vacancy by
absence.

38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament, he, without the permission of the House, fails to attend the House.

Quorum.

39. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

Voting in
House of
Representatives.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.

Part IV.—Both Houses of the Parliament.

Right of electors
of States.

41. No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

Oath or
affirmation of
allegiance.

42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the schedule to this constitution.

Member of one
House ineligible
for other.

43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

Disqualification.

44. Any person who—

- (i.) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power : or
- (ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer : or
- (iii.) Is an undischarged bankrupt or insolvent : or
- (iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth : or
- (v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons :

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

45. If a senator or a member of the House of Representatives—
- (i.) Becomes subject to any of the disabilities mentioned in the last preceding section : or
 - (ii.) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors : or
 - (iii.) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State :

his place shall thereupon become vacant.

46. Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

48. Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundreds pound a year, to be reckoned from the day on which he takes his seat.

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

50. Each House of the Parliament may make rules and orders with respect to—

- (i.) The mode in which its powers, privileges, and immunities may be exercised and upheld :
- (ii.) The order and conduct of its business and proceedings either separately or jointly with the other House.

Part V.—Powers of the Parliament.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to :—

- (i.) Trade and commerce with other countries, and among the States :
- (ii.) Taxation ; but so as not to discriminate between States or parts of States :
- (iii.) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth :

- (iv.) Borrowing money on the public credit of the Commonwealth :
- (v.) Postal, telegraphic, telephonic, and other like services :
- (vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth :
- (vii.) Lighthouses, lightships, beacons and buoys :
- (viii.) Astronomical and meteorological observations :
- (ix.) Quarantine :
- (x.) Fisheries in Australian waters beyond territorial limits :
- (xi.) Census and statistics :
- (xii.) Currency, coinage, and legal tender :
- (xiii.) Banking, other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money :
- (xiv.) Insurance, other than State insurance ; also State insurance extending beyond the limits of the State concerned :
- (xv.) Weights and measures :
- (xvi.) Bills of exchange and promissory notes :
- (xvii.) Bankruptcy and insolvency :
- (xviii.) Copyrights, patents of inventions and designs, and trade marks :
- (xix.) Naturalisation and aliens :
- (xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth :
- (xxi.) Marriage :
- (xxii.) Divorce and matrimonial causes ; and in relation thereto, parental rights, and the custody and guardianship of infants :
- (xxiii.) Invalid and old-age pensions :
- (xxiv.) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States :
- (xxv.) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States :
- (xxvi.) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws :
- (xxvii.) Immigration and emigration :
- (xxviii.) The influx of criminals :
- (xxix.) External affairs :
- (xxx.) The relations of the Commonwealth with the islands of the Pacific :
- (xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws :
- (xxxii.) The control of railways with respect to transport for the naval and military purposes of the Commonwealth :

- (xxxiii.) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State :
- (xxxiv.) Railway construction and extension in any State with the consent of that State :
- (xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State :
- (xxxvi.) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides :
- (xxxvii.) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law :
- (xxxviii.) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia :
- (xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or office of the Commonwealth.

52. The Parliament shall, subject to this Constitution, have **exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—** Exclusive powers of the Parliament

- (i.) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes :
- (ii.) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth :
- (iii.) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law. Powers of the Houses in respect of legislation.

The Senate may not amend any proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend,

requesting, by message, the omission or amendment of **any** items or provisions therein. And the House of Representatives **may**, if it thinks fit, make any of such omissions or amendments, **with** or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Appropriation
Bills.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall **deal only** with such appropriation.

Tax Bill.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with **any** other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only ; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Recommendation
of money
votes.

56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

Disagreement
between the
Houses.

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law, with or without any amendments, which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried

is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

The Governor-General may return to the house in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

CHAPTER II.

THE EXECUTIVE GOVERNMENT.

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

Ministers to sit in Parliament.

Number of Ministers.

Salaries of Ministers.

Appointment of civil servants.

Command of naval and military forces.

Transfer of certain departments.

Certain powers of Governor to vest in Governor-General.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

65. Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

67. Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council, or by a law of the Commonwealth to some other authority.

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth :—

Posts, telegraphs, and telephones :

Naval and military defence :

Lighthouses, lightships, beacons, and buoys :

Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

CHAPTER III.

THE JUDICATURE.

Judicial power and Courts.

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices not less than two, as the Parliament prescribes.

72. The Justices of the High Court and of the other courts created by the Parliament— Judges' appointment, tenure, and remuneration

- (i.) Shall be appointed by the Governor-General in Council ;
- (ii.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity ;
- (iii.) Shall receive such remuneration as the Parliament may fix ; but the remuneration shall not be diminished during their continuance in office.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences— Appellate jurisdiction of High Court

- (i.) Of any Justice or Justices exercising the original jurisdiction of the High Court ;
- (ii.) Of any other federal court, or court exercising federal jurisdiction ; or of the Supreme Court of any State, or of any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council ;
- (iii.) Of the Inter-State Commission, but as to questions of law only :

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council. Appeal to Queen in Council

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

Original jurisdiction of High Court.

75. In all matters—

- (i.) Arising under any treaty :
- (ii.) Affecting consuls or other representatives of other countries :
- (iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party :
- (iv.) Between States, or between residents of different States, or between a State and a resident or another State :
- (v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth :

the High Court shall have original jurisdiction.

Additional original Jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

- (i.) Arising under this Constitution, or involving its interpretation :
- (ii.) Arising under any laws made by the Parliament :
- (iii.) Of Admiralty and maritime jurisdiction :
- (iv.) Relating to the same subject-matter claimed under the laws of different States.

Power to define jurisdiction.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws—

- (i.) Defining the jurisdiction of any federal court other than the High Court :
- (ii.) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States :
- (iii.) Investing any court of a State with federal jurisdiction.

Proceedings against Commonwealth or State.

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

Number of judges.

79. The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

Trial by jury.

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

CHAPTER IV.

FINANCE AND TRADE.

Consolidated Revenue Fund.

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Expenditure charged thereon.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall

form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law. Money to be appropriated by law.

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth. Transfer of officers.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth: but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

85. When any department of the public service of a State is transferred to the Commonwealth— Transfer of property of State.

(i.) All property of the State of any kind, used exclusively in connection with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary:

(ii.) The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connection

with the department ; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth :

- (iii.) The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section ; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament :
- (iv.) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

87. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

89. Until the imposition of uniform duties of customs—

- (i.) The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.
- (ii.) The Commonwealth shall debit to each State—
 - (a) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth ;
 - (b) The proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth.

(iii.) The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State

Uniform duties
of customs.

Payment to
States before
uniform duties.

Exclusive power
over customs,
excise, and
bounties.

shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

91. Nothing in this Constitution prohibits a State from granting Exceptions as to bounties. any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

92. On the imposition of uniform duties of customs, trade, Trade within the Commonwealth to be free. commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides— Payment to States for five years after uniform tariffs.

(i.) The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State :

(ii.) Subject to the last sub-section, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth. Distribution of surplus.

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia, if that State be an Original State, may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth ; and such duties shall be collected by the Commonwealth. Customs duties of Western Australia.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

Financial assistance to States.

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Audit.

97. Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

Trade and commerce includes navigation and State railways.

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

Commonwealth not to give preference.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

Nor abridge right to use water.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the resident therein to the reasonable use of the waters of rivers for conservation or irrigation.

Inter-State Commission.

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

Parliament may forbid preferences by State.

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connection with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

Commissioners' appointment, tenure, and remuneration.

103. The members of the Inter-State Commission—

(i.) Shall be appointed by the Governor-General in Council:

(ii.) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an

address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity :

- (iii.) Shall receive such remuneration as the Parliament may fix ; but such remuneration shall not be diminished during their continuance in office.

104. Nothing in this Constitution shall render unlawful any Saving of certain rate for the carriage of goods upon a railway, the property of a rates. State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

105. The Parliament may take over from the States their public Taking over debts as existing at the establishment of the Commonwealth, or a public debts of proportion thereof according to the respective numbers of their States. people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof ; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

CHAPTER V.

THE STATES.

106. The Constitution of each State of the Commonwealth shall, Saving of subject to this Constitution, continue as at the establishment of Constitutions. the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution Saving of Power exclusively vested in the Parliament of the Commonwealth or of State Parla- withdrawn from the Parliament of the State, continue as at the ments. establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108. Every law in force in a Colony which has become or becomes Saving of State a State, and relating to any matter within the powers of the Par- laws. liament of the Commonwealth, shall, subject to this Constitution, continue in force in the State ; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parli-
ment of the State shall have such powers of alteration and of appeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109. When a law of a State is inconsistent with a law of the Inconsistency Commonwealth, the latter shall prevail, and the former shall, to of laws. the extent of the inconsistency, be invalid.

Provisions
referring to
Governor.

110. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

States may
surrender
territory.

111. The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

States may levy
charges for in-
spection laws.

112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

Intoxicating
liquids.

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

States may not
raise forces.
Taxation of
property of
Commonwealth
or State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

States not to
coin money.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

Commonwealth
not to legislate in
respect of
religion.

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Rights of
residents in
States.

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Recognition of
laws, &c., of
States.

118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

Protection of
States from
invasion and
violence.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

Custody of
offenders against
laws of the
Commonwealth.

120. Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

CHAPTER VI.

NEW STATES.

121. The Parliament may admit to the Commonwealth or New States may establish new States, and may upon such admission or establishment be admitted or established make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

122. The Parliament may make laws for the government of any Government of territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit. territories.

123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected. Alteration of limits of States.

124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected. Formation of new States.

CHAPTER VII.

MISCELLANEOUS.

125. The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney. Seat of Government.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

The Parliament shall sit at Melbourne until it meet at the seat of Government.

126. The Queen may authorise the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks Power to Her Majesty to authorise Governor-General to appoint deputies.

fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen ; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

Aborigines not to be counted in reckoning population.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

CHAPTER VIII.

ALTERATION OF THE CONSTITUTION.

Mode of altering the Constitution.

128. This Constitution shall not be altered except in the following manner :—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two or more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half of the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum

number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

SCHEDULE.

OATH.

I, *A.B.*, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. SO HELP ME GOD !

AFFIRMATION.

I, *A.B.*, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(NOTE.—*The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.*)

[APPENDIX B.]

QUEBEC RESOLUTIONS.

RESOLUTIONS ADOPTED AT QUEBEC, in October, 1864, at a Conference of Delegates from Upper and Lower Canada, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland.

1. The best interests and present and future prosperity of British North America will be promoted by a Federal Union under the Crown of Great Britain, provided such union can be effected on principles just to the several Provinces.

2. In the Federation of the British North American Provinces, the system of Government best adapted under existing circumstances to protect the diversified interests of the several Provinces, and secure efficiency, harmony and permanency in the working of the Union, would be a General Government charged with matters of common interest to the whole country, and Local Governments for each of the Canadas, and for the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, charged with the control of local matters in their respective sections,—provision being made for the admission into the Union, on equitable terms, of Newfoundland, the North-West Territory, British Columbia and Vancouver.

3. In framing a Constitution for the General Government, the Conference, with a view to the perpetuation of our connection with the Mother Country, and the promotion of the best interests of the people of these Provinces, desire to follow the model of the British Constitution, so far as our circumstances will permit.

4. The Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British Constitution, by the Sovereign personally, or by the Representative of the Sovereign duly authorised.

5. The Sovereign or Representative of the Sovereign shall be Commander-in-Chief of the Land and Naval Militia Forces.

6. There shall be a General Legislature or Parliament for the Federated Provinces, composed of a Legislative Council and a House of Commons.

7. For the purpose of forming the Legislative Council, the Federated Provinces shall be considered as consisting of three divisions: 1st, Upper Canada; 2nd, Lower Canada; 3rd, Nova Scotia, New Brunswick and Prince Edward Island; each division with an equal representation in the Legislative Council.

8. Upper Canada shall be represented in the Legislative Council by 24 members, Lower Canada by 24 members, and the three Maritime Provinces by 24 members, of which Nova Scotia shall have 10, New Brunswick 10, and Prince Edward Island 4 members.

9. The Colony of Newfoundland shall be entitled to enter the proposed Union with a representation in the Legislative Council of four members.

10. The North-West Territory, British Columbia and Vancouver shall be admitted into the Union on such terms and conditions as the Parliament of the Federated Provinces shall deem equitable, and as shall receive the assent of Her Majesty; and in the case of the Province of British Columbia or Vancouver as shall be agreed to by the Legislature of such Province.

11. The Members of the Legislative Council shall be appointed by the Crown under the Great Seal of the General Government, and shall hold office during life; if any Legislative

Councillor shall for two consecutive sessions of Parliament, fail to give his attendance in the said Council, his seat shall thereby become vacant.

12. The Members of the Legislative Council shall be British subjects by birth or naturalisation, of the full age of thirty years, shall possess a continuous real property qualification of four thousand dollars over and above all encumbrances, and shall be and continue worth that sum over and above their debts and liabilities; but in the case of Newfoundland and Prince Edward Island, the property may be either real or personal.

13. If any question shall arise as to the qualification of a Legislative Councillor, the same shall be determined by the Council.

14. The first selection of the Members of the Legislative Council shall be made, except as regards Prince Edward Island, from the Legislative Councils of the various Provinces so far as a sufficient number be found qualified and willing to serve; such Members shall be appointed by the Crown at the recommendation of the General Executive Government, upon the nomination of the respective Local Governments, and in such nomination due regard shall be had to the claims of the Members of the Legislative Council of the opposition in each Province, so that all political parties may, as nearly as possible, be fairly represented.

15. The Speaker of the Legislative Council (unless otherwise provided by Parliament) shall be appointed by the Crown from among the Members of the Legislative Council, and shall hold office during pleasure, and shall only be entitled to a casting vote on an equality of votes.

16. Each of the twenty-four Legislative Councillors representing Lower Canada in the Legislative Council of the General Legislature shall be appointed to represent one of the twenty-four Electoral Divisions mentioned in Schedule A of Chapter first of the Consolidated Statutes of Canada, and such Councillor shall reside or possess his qualification in the Division he is appointed to represent.

17. The basis of Representation in the House of Commons shall be Population, as determined by the Official Census every ten years; and the number of Members at first shall be 194, distributed as follows:—

Upper Canada	82
Lower Canada	65
Nova Scotia	19
New Brunswick	15
Newfoundland	8
Prince Edward Island ..	5

18. Until the Official Census of 1871 has been made up, there shall be no change in the number of Representatives from the several sections.

19. Immediately after the completion of the Census of 1871, and immediately after every decennial census thereafter, the Representation from each section in the House of Commons shall be readjusted on the basis of Population.

20. For the purpose of such readjustments, Lower Canada shall always be assigned sixty-five Members, and each of the other sections shall, at each readjustment, receive, for the ten years then next succeeding, the number of Members to which it will be entitled on the same ratio of Representation to Population as Lower Canada will enjoy according to the Census last taken, by having sixty-five Members.

21. No reduction shall be made in the number of members returned by any section, unless its population shall have decreased, relatively to the population of the whole Union, to the extent of five per centum.

22. In computing at each decennial period the number of Members to which each section is entitled, no fractional parts shall be considered, unless when exceeding one-half the number entitling to a Member, in which case a Member shall be given for each such fractional part.

23. The Legislature of each Province shall divide such Province into the proper number of constituencies, and define the boundaries of each of them.

24. The Local Legislature of each Province may, from time to time, alter the Electoral Districts for the purposes of Representation in such Local Legislature, and distribute the Representatives to which the Province is entitled in such Local Legislature, in any manner such Legislature may see fit.

25. The number of Members may at any time be increased by the General Parliament,—regard being had to the proportionate rights then existing.

26. Until provisions are made by the General Parliament, all the laws

which, at the date of the Proclamation constituting the Union, are in force in the Provinces respectively, relating to the qualification and disqualification of any person to be elected, or to sit or vote as a Member of the Assembly in the said Provinces respectively, and relating to the qualification or disqualification of voters, and to the oaths to be taken by voters, and to Returning Officers and their powers and duties,—and relating to the proceedings at Elections, and to the period during which such elections may be continued,—and relating to the Trial of Controverted Elections, and the proceedings incident thereto—and relating to the vacating of seats of Members, and to the issuing and execution of new Writs, in case of any seat being vacated otherwise than by a dissolution—shall respectively apply to elections of Members to serve in the House of Commons, for places situate in those Provinces respectively.

27. Every House of Commons shall continue for five years from the day of the return of the writs choosing the same, and no longer; subject, nevertheless, to be sooner prorogued or dissolved by the Governor.

28. There shall be a Session of the General Parliament once, at least, in every year, so that a period of twelve calendar months shall not intervene between the last sitting of the General Parliament in one Session, and the first sitting thereof in the next Session.

29. The General Parliament shall have power to make Laws for the peace, welfare and good government of the Federated Provinces (saving the Sovereignty of England), and especially laws respecting the following subjects :

1. The Public Debt and Property.
2. The regulation of Trade and Commerce.
3. The imposition or regulation of Duties of Customs on Imports and Exports,—except on Exports of Timber, Logs, Masts, Spars, Deals and Sawn Lumber from New Brunswick, and of Coal and other Minerals from Nova Scotia.
4. The imposition or regulation of Excise Duties.
5. The raising of money by all or any other modes or systems of Taxation.

6. The borrowing of money on the Public Credit.
7. Postal Service.
8. Lines of Steam or other Ships, Railways, Canals and other works, connecting any two or more of the Provinces together, or extending beyond the limits of any Province.
9. Lines of Steamships between the Federated Provinces and other Countries.
10. Telegraph Communication and the Incorporation of Telegraph Companies.
11. All such works as shall, although lying wholly within any Province, be specially declared by the Acts authorising them to be for the general advantage.
12. The Census.
13. Militia—Military and Naval Service and Defence.
14. Beacons, Buoys and Light Houses.
15. Navigation and Shipping.
16. Quarantine.
17. Sea Coast and Inland Fisheries.
18. Ferries between any Provinces and a Foreign country, or between any two Provinces.
19. Currency and Coinage.
20. Banking—Incorporation of Banks, and the issue of Paper Money.
21. Savings Banks.
22. Weights and Measures.
23. Bills of Exchange and Promissory Notes.
24. Interest.
25. Legal Tender.
26. Bankruptcy and Insolvency.
27. Patents of Invention and Discovery.
28. Copy Rights.
29. Indians and Lands reserved for the Indians.
30. Naturalisation and Aliens.
31. Marriage and Divorce.
32. The Criminal Law, excepting the Constitution of Courts of Criminal Jurisdiction, but including the procedure in Criminal matters.
33. Rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island, and rendering uniform the procedure of all or any of the Courts in these Provinces; but any

statute for this purpose shall have no force or authority in any Province until sanctioned by the Legislature thereof.

34. The establishment of a General Court of Appeal for the Federated Provinces.

35. Immigration.

36. Agriculture.

37. And generally respecting all matters of a general character, not specially and exclusively reserved for the Local Governments and Legislatures.

30. The General Government and Parliament shall have all powers necessary or proper for performing the obligations of the Federated Provinces, as part of the British Empire, to foreign countries, arising under Treaties between Great Britain and such countries.

31. The General Parliament may also, from time to time, establish additional Courts, and the General Government may appoint Judges and officers thereof, when the same shall appear necessary or for the public advantage, in order to the due execution of the laws of Parliament.

32. All Courts, Judges, and officers of the several Provinces shall aid, assist and obey the General Government in the exercise of its rights and powers, and for such purposes shall be held to be Courts, Judges and officers of the General Government.

33. The General Government shall appoint and pay the Judges of the Superior Courts in each Province, and of the County Courts in Upper Canada, and Parliament shall fix their salaries.

34. Until the consolidation of the Laws of Upper Canada, New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island, the Judges of these Provinces, appointed by the General Government, shall be selected from their respective Bars.

35. The Judges of the Courts of Lower Canada shall be selected from the Bar of Lower Canada.

36. The Judges of the Court of Admiralty now receiving salaries, shall be paid by the General Government.

37. The Judges of the Superior Courts shall hold their offices during good behaviour, and shall be remov-

able only on the Address of both Houses of Parliament.

38. For each of the Provinces there shall be an Executive Officer, styled the Lieutenant-Governor, who shall be appointed by the Governor-General in Council, under the Great Seal of the Federated Provinces, during pleasure; such pleasure not to be exercised before the expiration of the first five years, except for cause: such cause to be communicated in writing to the Lieutenant-Governor immediately after the exercise of the pleasure as aforesaid, and also by Message to both Houses of Parliament, within the first week of the first session afterwards.

39. The Lieutenant-Governor of each Province shall be paid by the General Government.

40. In undertaking to pay the salaries of the Lieutenant-Governors, the Conference does not desire to prejudice the claim of Prince Edward Island upon the Imperial Government for the amount now paid for the salary of the Lieutenant-Governor thereof.

41. The Local Government and Legislature of each Province shall be constructed in such manner as the existing Legislature of each such Province shall provide.

42. The Local Legislature shall have power to alter or amend their Constitution from time to time.

43. The Local Legislatures shall have power to make laws respecting the following subjects:

1. Direct taxation, and in New Brunswick the imposition of duties on the export of Timber, Logs, Masts, Spars, Deals and Sawn Lumber; and in Nova Scotia, of Coals and other Minerals.
2. Borrowing money on the credit of the Province.
3. The establishment and tenure of local offices, and the appointment and payment of local officers.
4. Agriculture.
5. Immigration.
6. Education; saving the rights and privileges which the Protestant or Catholic minority in both Canadas may possess as to their denominational schools, at the time when the union goes into operation.

7. The sale and management of Public Lands, excepting Lands belonging to the General Government.
 8. Sea Coast and Inland Fisheries.
 9. The establishment, maintenance and management of Penitentiaries, and Public and Reformatory Prisons.
 10. The establishment, maintenance and management of Hospitals, Asylums, Charities and Eleemosynary Institutions.
 11. Municipal Institutions.
 12. Shop, Saloon, Tavern, Auctioneer and other Licences.
 13. Local Works.
 14. The incorporation of Private or Local Companies, except such as relate to matters assigned to the General Parliament.
 15. Property and Civil Rights, excepting those portions thereof assigned to the General Parliament.
 16. Inflicting punishment by fine, penalties, imprisonment or otherwise, for the breach of laws passed in relation to any subject within their jurisdiction.
 17. The Administration of Justice, including the constitution, maintenance and organisation of the Courts, both of Civil and Criminal jurisdiction, and including also the procedure in civil matters.
 18. And generally all matters of a private or local nature, not assigned to the General Parliament.
44. The power of respiting, re-prieving, and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant-Governor of each Province in Council, subject to any instructions he may, from time to time, receive from the General Government, and subject to any provisions that may be made in this behalf by the General Parliament.
45. In regard to all subjects over which jurisdiction belongs to both the General and Local Legislatures, the laws of the General Parliament shall control and supersede those made by the Local Legislature, and

the latter shall be void so far as they are repugnant to, or inconsistent with, the former.

46. Both the English and French languages may be employed in the General Parliament and in its proceedings, and in the Local Legislature of Lower Canada, and also in the Federal Courts and in the Courts of Lower Canada.

47. No lands or property belonging to the General or Local Governments shall be liable to taxation.

48. All Bills for appropriating any part of the Public Revenue, or for imposing any new Tax or Impost, shall originate in the House of Commons or House of Assembly, as the case may be.

49. The House of Commons or House of Assembly shall not originate or pass any Vote, Resolution, Address or Bill for the appropriation of any part of the Public Revenue, or of any Tax or Impost to any purpose, not first recommended by Message of the Governor-General or the Lieutenant-Governor, as the case may be, during the Session in which such Vote, Resolution, Address or Bill is passed.

50. Any Bill of the General Parliament may be reserved in the usual manner for Her Majesty's assent, and any Bill of the Local Legislatures may, in like manner, be reserved for the consideration of the Governor-General.

51. Any Bill passed by the General Parliament shall be subject to disallowance by Her Majesty within two years, as in the case of Bills passed by the Legislatures of the said Provinces hitherto; and, in like manner, any Bill passed by a Local Legislature shall be subject to disallowance by the Governor-General within one year after the passing thereof.

52. The Seat of Government of the Federal Provinces shall be Ottawa, subject to the Royal Prerogative.

53. Subject to any future action of the respective Local Governments, the Seat of the Local Government in Upper Canada shall be Toronto; of Lower Canada, Quebec; and the Seats of the Local Governments in the other Provinces shall be as at present.

54. All Stocks, Cash, Bankers' Balances and Securities for money

belonging to each Province at the time of the Union, except as hereinafter mentioned, shall belong to the General Government.

55. The following Public Works and Property of each Province shall belong to the General Government, to wit :—

1. Canals.
2. Public Harbours.
3. Light Houses and Piers.
4. Steamboats, Dredges and Public Vessels.
5. River and Lake Improvements.
6. Railway and Railway Stocks, Mortgages and other debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices and other Public Buildings, except such as may be set aside by the General Government for the use of the Local Legislatures and Governments.
9. Property transferred by the Imperial Government and known as Ordnance Property.
10. Armories, Drill Sheds, Military Clothing and Munitions of War ; and
11. Lands set apart for public purposes.

56. All Lands, Mines, Minerals and Royalties vested in Her Majesty in the Provinces of Upper Canada, Lower Canada, Nova Scotia, New Brunswick and Prince Edward Island, for the use of such Provinces, shall belong to the Local Government of the territory in which the same are so situate ; subject to any trusts that may exist in respect to any of such lands or to any interest of other persons in respect of the same.

57. All sums due from purchasers or lessees of such lands, mines or minerals at the time of the Union, shall also belong to the Local Governments.

58. All Assets connected with such portions of the Public Debt of any Province as are assumed by the Local Governments, shall also belong to those Governments respectively.

59. The several Provinces shall retain all other Public Property therein, subject to the right of the General Government to assume any Lands or Public Property required

for Fortifications or the Defence of the Country.

60. The General Government shall assume all the Debts and Liabilities of each Province.

61. The Debt of Canada, not specially assumed by Upper and Lower Canada respectively, shall not exceed, at the time of the Union, \$62,500,000 ; Nova Scotia shall enter the Union with a debt not exceeding \$8,000,000 ; and New Brunswick with a debt not exceeding \$7,000,000.

62. In case Nova Scotia or New Brunswick do not incur liabilities beyond those for which their Governments are now bound, and which shall make their debts, at the date of Union, less than \$8,000,000 and \$7,000,000 respectively, they shall be entitled to interest at five per cent. on the amount not so incurred, in like manner as is hereinafter provided for Newfoundland and Prince Edward Island ; the foregoing resolution being in no respect intended to limit the powers given to the respective Governments of those Provinces by Legislative authority, but only to limit the maximum amount of charge to be assumed by the General Government ; provided always that the powers so conferred by the respective Legislatures shall be exercised within five years from this date, or the same shall then elapse.

63. Newfoundland and Prince Edward Island, not having incurred debts equal to those of the other Provinces, shall be entitled to receive, by half-yearly payments, in advance, from the General Government, the interest at five per cent. on the difference between the actual amount of their respective debts at the time of the union, and the average amount of indebtedness per head of the population of Canada, Nova Scotia and New Brunswick.

64. In consideration of the transfer to the General Parliament of the powers of taxation, an annual grant in aid of each Province shall be made, equal to eighty cents per head of the population, as established by the Census of 1861 ; the population of Newfoundland being estimated at 130,000. Such aid shall be in full settlement of all future demands upon the General Government for local purposes, and shall be paid half-yearly in advance to each Province.

65. The position of New Brunswick being such as to entail large immediate charges upon her local revenues, it is agreed that for the period of ten years from the time when the Union takes effect, an additional allowance of \$63,000 per annum shall be made to that Province. But that so long as the liability of that Province remains under \$7,000,000, a deduction equal to the interest on such deficiency shall be made from the \$63,000.

66. In consideration of the surrender to the General Government, by Newfoundland, of all its rights in Mines and Minerals, and of all the ungranted and unoccupied Lands of the Crown, it is agreed that the sum of \$150,000 shall each year be paid to that Province by semi-annual payments ; provided that that Colony shall retain the right of opening, constructing and controlling roads and bridges through any of the said lands, subject to any laws which the General Parliament may pass in respect of the same.

67. All engagements that may, before the Union, be entered into with the Imperial Government for the defence of the country, shall be assumed by the General Government.

68. The General Government shall secure, without delay, the completion of the inter-Colonial Railway from Rivière du Loup, through New Brunswick, to Truro in Nova Scotia.

69. The communications with the North-Western Territory, and the improvements required for the development of the trade of the Great West with the seaboard, are regarded by this Conference as subjects of the highest importance to the Federated Provinces, and shall be prosecuted at the earliest possible period that the state of the finances will permit.

70. The sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference.

71. That Her Majesty the Queen be solicited to determine the rank and name of the Federated Provinces.

72. The Proceedings of the Conference shall be authenticated by the signatures of the Delegates, and submitted by each Delegation to its own Government, and the Chairman is authorised to submit a copy to the Governor-General for transmission to the Secretary of State for the Colonies.

[APPENDIX C.]

THE JURISDICTION OF THE SUPREME COURT OF CANADA.

The Jurisdiction of the Supreme Court of Canada is as follows :—

I. Under 38 Vict. Cap. XI., Sec. 17 :—

“ Subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from all final judgments of the highest Court of final resort, whether such Court be a Court of Appeal or of original jurisdiction, now or hereafter established in any Province of Canada in cases in which the Court of original jurisdiction is a Superior Court : Provided that no appeal shall be allowed from any judgment rendered in the province of Quebec, in any case wherein the sum or value of the matter in dispute does not amount to 2,000 dollars* ; and the right to appeal in civil cases given by this Act shall be understood to be given in such cases only as are mentioned by this Section, except Exchequer cases, cases of *mandamus*, *habeas corpus* or municipal by-laws as hereinafter provided.

II. Under the Revised Statutes, Dominion of Canada, 1886, Cap. 135, Sec. 26 :—

(1) “ Except as otherwise provided in this Act, or in the Act provided for the appeal, no appeal shall lie to the Supreme Court but from the highest Court of last resort having jurisdiction in the Province in which the action, suit, or cause, matter, or other judicial proceeding was originally constituted, whether the judgment or decision in such action, suit, cause, matter or other judicial proceeding was or was not a proper subject of appeal to such highest Court of last resort.

(2) “ Provided that an appeal shall be directly to the Supreme Court from the judgment of the Court of original jurisdiction by consent of parties.

(3) “ Provided also that an appeal shall lie to the Supreme Court by leave of such Court, or a Judge thereof, from any judgment, decree, or decretal order, or order made and pronounced by a Court of Equity, or made or pronounced by any Judge in Equity, or by any Superior Court in any action, cause or matter or other judicial proceeding in the nature of a suit or proceeding in equity, and from the final judgment of any Superior Court of any Province—other than the Province of Quebec—in any action, suit, cause, matter or other judicial proceeding originally commenced in such Superior Court, without any intermediate appeal being had to any intermediate Court of appeal in the Province.”

III. Under the Revised Statutes, 1886, Cap. 135, Sec. 29 :—

“ No appeal shall lie under this Act from any judgment rendered in the Province of Quebec in action, suit, cause, matter or other judicial proceeding, wherein the matter in controversy does not amount to the sum or value of 2,000 dollars, unless such matter, if less than that amount :—

- (a) “ Involves the question of the validity of an Act of the Parliament of Canada, or of the Legislature of any of the Provinces of Canada, or of an Ordinance or Act of any of the Councils or Legislative bodies of any of the territories or districts of Canada.
- (b) “ Relates to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents or such like matters or things where the rights in future might be bound.”

* *Vide* III. below.

IV. Under 54 and 55 *Vict.* [D] *Cap.* 25, *Sec.* 3. [Repealing Sub-Sec. 2, *Sec.* 29 Revised Statutes, 1886, *Cap.* 135]:—

(1) “Where the matter in controversy involves any such question, or relates to any such fee of office, duty, rent, revenue or sum of money payable to Her Majesty, or to any such title to lands or tenements, annual rents or such like matters or things where rights in the future might be bound, or amounts to or exceeds the sum or value of 2,000 dollars, there shall be an appeal from judgments rendered in the said Province, although such action, suit, cause, matter or other judicial proceeding may not have been originally instituted in the Superior Court.

(2) “Provided that such appeals shall lie only from the Courts of Queen’s Bench, or from the Superior Court in review in cases where, and so long as, no appeal lies from the judgment of that Court when it *confirms* the judgment of the Court appealed from, which by the law of the Province of Quebec are appealable to the Judicial Committee of the Privy Council.

(3) “Whenever the right to appeal is dependent on the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different.”

V. Under 54 and 55 *Vict.* [D], *Cap.* 25, *Sec.* 4. [Repealing *Sec.* 37, *Cap.* 135 Revised Statutes, 1886]:—

(1) “Important questions of law or fact touching provincial legislation, or the appellate jurisdiction as to educational matters vested in the Governor-in-Council by the B.N.A. Act, 1867, or by any other Act or law, or touching the constitutionality of any legislation of the Parliament of Canada, or touching any other matter with reference to which he sees fit to exercise this power, may be referred, by the Governor-in-Council, to the Supreme Court for hearing or consideration; and the Court shall thereupon hear and consider the same.

(2) “The Court shall certify to the Governor-in-Council, for his information, its opinion on questions so reserved, with the reasons therefor, which shall be given in like manner as in the case of a judgment upon an appeal to the said Court; and any Judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons.”

[The other sub-sections of this Section provide for the representation before the Court of States, Territories or parties interested in a question so referred; for the right of the Court to have the matter argued by Counsel; for the treatment of the Courts’ opinion as a final judgment for all purposes of appeal to Her Majesty in Council; and for the power of the Judges to make rules applicable to cases so referred.]

[APPENDIX D.]

THE SWISS FEDERAL EXECUTIVE.

The provisions of the Federal Constitution of Switzerland, establishing and defining the functions of the Federal Executive—known as the Federal Council,—are contained in Articles 95 to 104. They are as follows :—

ARTICLE 95.

The supreme executive and directive body of the Confederation shall be a Federal Council consisting of seven members.

ARTICLE 96.

The members of the Federal Council shall be chosen by the Federal Assembly for the term of three years, from among all Swiss citizens who are eligible to the National Council. Not more than one member shall be chosen from the same Canton.

After every general election for the National Council, the Federal Council shall also be integrally renewed.

In cases of vacancy in the meantime in the Federal Council, the vacancies shall be filled for the rest of the term at the next meeting of the Federal Assembly.

ARTICLE 97.

The members of the Federal Council shall not hold any office either in the service of the Union or of a Canton, nor engage in any other calling or business.

ARTICLE 98.

The Federal President who shall preside over the Federal Council shall be chosen, together with the Vice-President, for the term of one year, by the Councils in joint session from among their members.

The retiring President is not eligible either as President or Vice-President for the next following year. The same member may not hold the office of Vice-President for two consecutive years.

ARTICLE 99.

The Federal President and the other members of the Federal Council shall receive a compensation from the Federal Treasury.

ARTICLE 100.

In order to make action valid, four members of the Federal Council must be present.

ARTICLE 101.

The members of the Federal Council shall have the right to take part in the discussions of both branches of the Federal Assembly, and also the right to make motions on any matter under consideration.

ARTICLE 102.

The Federal Council shall have especially the following rights and duties, subject to the provisions of the present Constitution :

1. It shall direct Federal affairs according to Federal laws and decrees.
2. It shall care for the due observance of the Constitution, laws, and decrees of the Union, as well as the provisions of Federal concordats. It shall take the necessary measures for their execution either on its own initiative or upon complaint, so far as the decision of such affairs has not been vested in the Federal Tribunal by Article 113.

3. It shall enforce the guarantee of the Cantonal Constitutions.
 4. It shall propose to the Federal Assembly laws and decrees, and shall report upon the propositions sent to it by the Councils of the Union or by the Cantons.
 5. It shall execute the Federal laws and decrees, the judgments of the Federal Tribunal, as well as the compromises and arbitrators' decisions on questions of dispute among the Cantons.
 6. It shall make such appointments as are not entrusted to the Federal Assembly, Federal Tribunal, or to some other body.
 7. It shall examine the treaties of the Cantons with one another or with foreign countries, and shall approve them so far as they are permissible. (Article 85, No. 5.)
 8. It shall protect the external interests of the Union especially in all international relations and shall in general have charge of foreign affairs.
 9. It shall protect the internal safety, and the independence and neutrality of Switzerland.
 10. It shall care for the external security of the Union, and for the establishment of quiet and order.
 11. In urgent cases the Federal Council shall have authority, if the Councils are not in session, to call out the necessary number of troops and employ them as it shall see fit: provided that it shall call the Councils together immediately, and provided further that the number of men called out shall not exceed two thousand, nor the term of service exceed three weeks.
 12. It shall have charge of Federal army affairs, and all branches of administration which belong to the Union.
 13. It shall examine those laws and ordinances of the Cantons which require its approval; and shall watch over those branches of Cantonal administration which are subject to its supervision.
 14. It shall manage the finances of the Union, and provide for the preparation of estimates and for a statement of the accounts of Federal income and expenditure.
 15. It shall exercise the supervision over the conduct of business by all officers and employees of the Federal administration.
 16. It shall report to the Federal Assembly at each ordinary session upon its conduct of business, upon the internal condition and foreign relations of the Union, and shall recommend to its attention such measures as in its judgment are desirable for the promotion of the common welfare.
- It shall also make special reports upon the demand of the Federal Assembly or either branch thereof.

ARTICLE 103.

The business of the Federal Council shall be divided according to departments among its various members. The sole purpose of this division is to facilitate the examination and despatch of business. Every decision must emanate from the Federal Council as a body.

ARTICLE 104.

The Federal Council and its departments are authorised to call in the aid of experts for special matters.

Such being the method of appointment, and duties, of the members of the Swiss Federal Council, it is interesting to examine the way in which those duties are carried out.

In the first place the work of administration is divided into seven departments [Foreign Affairs, Interior, Justice and Police, War, Finance, Industry and Agriculture, Post Office and Railroads], which are apportioned among the members by arrangement among themselves. This arrangement dates from 1888. Up to that year, the President was always entrusted with the management of Foreign Affairs. He may now hold any one of the seven departments.

The President has no more power than the other members of the Council, though he exercises a general supervision, so far as he can, over the work of the other departments. His position is comparable to that of chairman of a board of directors. In addition to the work of his particular department, he also has some formal duties to perform: thus he receives foreign ambassadors; has precedence at public functions, etc.

In their relation to the Legislature, the members of the Federal Council are not bound by party ties; nor are they always in political agreement among themselves. It is, in fact, the rule that the Council should represent the predominant shades of political opinion. Thus each Minister drafts the Bills belonging to his department, which, though they are introduced with the formal approval of the whole Council, may be opposed in the Federal Assembly by some other member of the Council. If a Bill thus introduced by a member of the Federal Council is defeated in the Legislature, there is no obligation on the Councillor to resign his post. Similarly, if the Federal Council as a whole is opposed by the Legislature it gives way with a good grace. Thus a serious conflict between the Legislature and the Executive is quite out of the question. "It is, in fact, a general maxim of public life in Switzerland that an official gives his advice, but, like a lawyer or an architect, he does not feel obliged to throw up his position because his advice is not followed."

"The Council"—says Mr. Lowell ["Governments and Parties in Continental Europe," vol. II., p. 203]—"reflects the past rather than the existing party colouring of the Assembly. This result is due to the fact that the Council is virtually a permanent body, for, whilst it is chosen afresh every three years, the old members are always re-elected; and, indeed since 1848, only two members who were willing to serve have failed of re-election, one of whom lost his seat in 1854 and the other in 1872, at times when party spirit still ran high. The permanence of tenure becomes astonishing when we consider that from 1848 to June, 1893, there had been only thirty-one Federal Councillors in all, of whom seven were still in office. The average period of service has therefore been over ten years; and in fact fifteen members have held the position for more than that length of time, four of them having served over twenty years, and one over thirty years." The members of the Council, having once been elected by the Federal Assembly, cannot be removed until the expiration of their three years' term. Nor, conversely, has the Federal Council any power to dissolve the Federal Assembly.

As to the means by which the Federal Council makes its power felt, a distinction must be drawn between its control over foreign affairs and over internal administration. "With respect to foreign affairs"—says Adams ["The Swiss Confederation," p. 61]—"the Federal Council possesses a real power, being independent of the Cantons. It watches over the interests of the Confederation abroad, and is entrusted generally with all that concerns foreign relations.

"With respect to internal affairs, it watches over the due observance of the provisions of the Constitution and of Federal laws and resolutions and provides for the execution of the decisions of the Federal Assembly, of the judgments of the Federal Tribunal, and of diverse matters where disputes arise between Cantons. It has to examine whether the articles of the various Cantonal Constitutions are in harmony or not with the principles laid down in the Federal Constitution, and it reports upon them to the Federal Assembly; it has also to examine laws passed by the Cantons, in order to judge whether they are in accordance with the Federal Constitution and do not conflict with Federal laws. But herein lies an imperfection which, we are assured, is readily acknowledged by all sound Swiss statesmen. If a Cantonal Government chooses to adopt a measure which the Federal Council, when appealed to, considers to be unconstitutional, and if it declines to submit to that Council's order to cancel or revoke such measure, the latter has no direct way of enforcing its order." But, as Mr. Lowell observes,* "when trouble with a Canton arises from any cause the Council withholds the subsidies due to the Canton, and sends troops into it, who accomplish their mission without bloodshed; for they do not pillage, burn or kill, but are peaceably quartered there at the expense of the Canton, and literally eat it into submission. This is certainly a novel way of enforcing obedience to the law, but with the frugal Swiss it is very effective."

To sum up, the distinctive features of the Swiss Federal Council are that it is not elected by the people direct, but by the Federal Assembly; that it cannot be dismissed by, and cannot itself dissolve, the Federal Assembly; that it does not work on the lines of party or responsible government as obtaining in Anglo-Saxon countries; and that its direct executive power is very small when compared with its extensive executive duties and responsibilities. Further, it has one remarkable peculiarity—the duty of deciding upon the question whether the Constitutions and Laws of the Cantons are consistent with the Constitution and Laws of the Union. In this respect it performs functions which, in the Unions of Anglo-Saxon States, are vested in the Federal Tribunal.

* "Governments and Parties in Cont. Eur.," Vol. II., p. 197.

[APPENDIX E.]

THE REFERENDUM IN SWITZERLAND.

The Swiss Referendum exists both as regards the Federal Government and as regards that of the several Cantons. In its application to the Federal Government it is in use both as to revisions of the Constitution and as to the passage of ordinary laws.

“A total revision of the Constitution may be brought about in three ways:—

1. The National Council and the Council of States may agree to an amendment, as in the case of an ordinary Federal law. The Constitution as drawn up by the two Councils, must then be submitted to the popular vote, and if it is approved by a majority of the people and by a majority of the Cantons, it becomes law.

2. If one Chamber votes for a total revision and the other refuses its assent, the question is then submitted to the electors in each Canton: ‘Do you wish the Constitution to be revised—Yes or No?’ If the majority of electors vote ‘Yes,’ in support of a revision, the two Chambers are then dissolved and a new Federal Parliament is elected charged with the work of revising and drafting a new constitution. When this has been prepared, it is submitted to the popular vote, and if it is approved by a majority of the people and by a majority of the Cantons, it becomes law.

3. If 50,000 citizens sign a petition in favour of a total revision of the Constitution, it is the duty of the Executive to submit the question to the electors: ‘Do you wish the Constitution to be revised—Yes or No?’ If a majority of the electors decide in favour of revision, the Federal Legislature has to carry out the popular wish, and revise the Constitution for submission to the people. If on such submission it is approved by the required double majority, it becomes law.

“There are two methods by which a partial revision or a partial amendment of the Swiss Constitution may be brought about. An amendment may be proposed by the two Federal Chambers, as in the ordinary process of legislation. It must then be submitted to and accepted by a majority of the people and by a majority of the Cantons. A demand for the adoption of a new Article, or the alteration of an old one, may be made in writing by 50,000 Swiss citizens in the same way as a demand for a total revision. If the Federal Legislature agrees with the demand of the petitioners, it proceeds to formulate the required amendment and prepare it for submission to the people. If, on the other hand, it disagrees with the demand the question is submitted to the people: ‘Are you in favour of a revision of the Constitution—Yes or No?’ If a majority of the people decide in favour of a revision, it becomes the duty of the Federal Legislature, acting as a draft Committee,

to prepare the required amendment for submission to the people. It is then submitted to the popular vote and if it receives the support of the required statutory majority of people and of Cantons it becomes law. The final referendum is obligatory in every proposal to amend the Constitution. [*Deploige: Referendum in Switzerland*, pp. 128-131.]” *

In the case of ordinary laws passed by the Federal Legislature, a referendum can be demanded either by 30,000 citizens or by Eight Cantons, unless the Federal Assembly declares the law to be urgent. The Assembly has declared that a referendum cannot be demanded upon the annual budget, treaties, approval of a Cantonal Constitution, decision on a question involving a conflict of authority, subvention voted for the construction of roads or the diking of streams, etc.† Laws to which the referendum is applicable do not take effect till ninety days after their passage through the Assembly, so as to give time for the necessary demand.

It will thus be seen that there are two forms of Referendum in Switzerland—the *Obligatory* form, in which a referendum is ordered by the Constitution in certain cases; and the *Optional* form, in which the referendum only takes place when demanded in the proper way. The Federal Constitution provides only for the *Optional* form in the case of the revision of laws passed by the Federal Legislature. The demand which is necessary in the case of the *Optional* form is known as the *Initiative*.

In some of the Cantons, however, the *Obligatory* form of Referendum is applied also to ordinary laws passed by the Cantonal Legislature. As a matter of fact, about half the Cantons have the *Optional* and the other half the *Obligatory* form for expressing the popular decision on ordinary laws. All have the *Obligatory* form for revisions of their Constitutions. [*Vide*, on the whole subject, *Deploige: Referendum in Switzerland*; and *Lowell: Govts and Parties in Continental Europe*, Vol. II., Chap. XII.]

* Ann. Const. Aust. Const., p. 995.

† Lowell: Govts. and Parties in Cont. Eur., Vol. II., p. 253.

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